***United States Court of Appeals***

***for the Second Circuit***




# APPELLANT'S APPENDIX

75-1158

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IN THE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 75 - 1158

UNITED STATES OF AMERICA,

Appellee,

v.

ANTHONY RIZZO, et als.

PHILIP LUBRANO,

Appellant.

ON APPEAL FROM JUDGMENT OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

Sat below:

Motley, U.S.D.J. and
a Jury

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APPENDIX OF APPELLANT PHILIP LUBRANO

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HOCHHEISER & COHEN
Attorneys for Appellant,
Philip Lubrano
16 Court Street
Brooklyn, New York 11241

LAWRENCE HOCHHEISER
KENNETH J. ARONSON
On the Brief

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As a matter of law, Judge, there is just no case there and I think we can save a lot of time. I think Mr. Timbers would probably conde that I'm essentially correct in my assessment of what the evidence against Mr. Lubrano is.

MR. TIMBERS: Your Honor, I think that is the wrong place for it. I simply point out that Mr. Hochheiser has conveniently omitted all of the testimony about the third substantive count which charges his client with distributing the cocaine. That is the transaction at the bar and the Gaiety East Luncheonette.

THE COURT: Yes. I think the time to make your motion is at the end of the Government's case.

Let's proceed.

(In open court.)

MR. TIMBERS: The Government calls Special Agent Michael Peterson.

XXXX

M I C H A E L A. P E T E R S O N, called as a witness by the Government, having first been duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. TIMBERS.

Q Mr. Peterson, what is your present business?

A I am in the restaurant business.

Q Directing your attention to the spring of 1973,

by whom were you employed at that time?

A The Drug Enforcement Administration.

Q Where were you stationed?

A New York.

Q What was your position with the Drug Enforcement Administration at that time?

A Special Agent.

Q What were your duties as a special agent?

A Enforce federal narcotics laws.

Q When did you begin to work for the Drug Enforcement Administration?

A 1971.

Q Directing your attention to the spring of 1973, did you participate in the investigation of the present case?

A Yes, sir, I d d.

Q Will you describe that investigation to the jury, starting from the beginning.

A In early 1973 I developed an informant --

MR. GRABER: Objection, your Honor. I object to the statement of the witness. I also object at this time to the highly general nature of the question. He can go afield all over the place.

THE COURT: Overruled.

MR. GRABER: Exception.

A I developed an informant for the purpose of initiating cases, narcotics cases against narcotic traffickers.

Around the middle of April, April 12, 1973, I observed this informant -- should I refer by name or --

Q Yes, refer to him by name.

THE COURT: Yes.

Q What was the informant's name?

A Anthony Giordano, known as Tony Finn.

Q Where is the informant today?

A He is dead. On April 12, 1973, myself and Agent Smith, subsequent to negotiations and conversations with Anthony Finn, observed Finn meet with an individual in the vicinity of 56th Street and Lexington Avenue, New York City.

Q Is the person that Finn met with on Apri 12, 1973 in the courtroom today?

A Yes, sir, he is.

Q Would you point to him for the jury, please.

A Yes. The gentleman in the maroon jacket.

MR. TIMBERS: May the record reflect the witness has identified the defendant Anthony Rizzo.

THE COURT: Yes.

Q Proceed, Mr. Peterson.

A I observed Finn meet with Mr. Rizzo in the vicinity

of 56th Street and Lexington Avenue, enter a bar just off the corner, remain for a few minutes. They left the bar, walked to the corner, appeared to converse shortly. Rizoo entered an automobile and departed the area.

Q How long were they together in the bar?

A A short while. Half an hour, approximately.

On May 1st, I believe it was, subsequent again to conversations with Finn, myself and other agents initiated surveillance in the vicinity of Canal and Allen Streets, New York City.

Q Agent Peterson, before you proceed any farther, I show you a diagram that has been drawn on the blackboard.

Can you identify the area of that diagram?

A This appears to be Canal, and we were in this immediate area, right here.

Q Is the diagram on the blackboard an accurate diagram of the area near Canal Street in downtown Manhattan where you were on the night of May 1st?

A I couldn't say it's accurate. It appears to be similar to the area. I would assume this to have been Division Street. I would say it's close.

Q Proceed. Tell the jury what happened on May 1st.

A Prior to myself going to this area, I met with Finn. I searched him, I searched his vehicle, found no contraband.

I fitted him with an electronic transmitting device. I gave him $800 serialized official funds and followed him into the area.

I proceeded into the area and he proceeded into the area and entered an establishment, Jay's Jewelry Box, a jewelry store on Canal Street. I assume this would be Jay's Jewel Box.

MR. TIMBERS: Perhaps we can make this easier.

Q Is this the spot to which you are referring?

A No, it's the other one.

MR. TIMBERS: I will put a J on here.

(Pause.)

A Finn remained inside a short while, exited with Mr. Rizzo. They walked down to a bar, Block's Bar, I assume in this area.

MR. TIMBERS: For the record, just let me mark that as Block's.

MR. GRABER: Your Honor, in effect what Mr. Timbers is doing is leading the witness. If he is familiar with the area, he can carry on the story by himself.

THE COURT: Do you want the witness to mark the board himself?

MR. GRABER: I think the witness should be permitted to testify on his own, without any help from Mr. Timbers.

MR. TIMBERS: Your Honor, I am supposed to do that. The only reason I made the marks was that it appeared to me difficult for Mr. Peterson to lean over and mark the marks. But I do it.

Q Proceed.

A Finn and Rizzo left Jay's Jewel Box, proceeded down to Block's Bar. This was around, and the times are vague, but it was the late afternoon, five, six o'clock.

They enter the bar and they remain inside several hours, two or three hours.

Q Let me break into your story at that point.

You said that Mr. Finn had a recording device on him. Can you tell the jury how that recording device operated?

A It is just a small transmitter that is secreted on an individual's body and it transmits any conversation or any sound to a receiver located in an automobile or hand held receiver for a short distance. It's a channel-to-channel type thing.

Q Was there a receiver on the night of May 1st, 1973?

Q Yes, sir, there was.

Q Who was operating that receiver?

A There were numerous receivers. I was operating the receiver equipped with the tape recorder.

Q Were the conversations that were recorded on that tape recorder receiver recorded?

A Yes, sir, they were.

Q Proceed.

A After two or three hours inside the bar, I observed--myself and the other agents observed an individual arrive and enter the bar. Shortly thereafter Finn, Mr. Rizzo and this same individual exited the bar.

Q Is that individual in the courtroom today?

A Yes, he is.

Q Will you point to him?

A Yes, sir. This gentleman in the blue jacket.

MR. TIMBERS: May the record reflect that the witness has identified the defendant Vitale.

THE COURT: Yes.

Q Proceed.

A Finn, Mr. Rizzo, Mr. Vitale, left the bar, got into Mr. Vitale's car, drove to -- back up to Jay's Jewelry Box. All three got out of the car and went inside. They remained there for a short while and came back outside.

Q Let me break in again.

Could you hear what was being said inside Jay's Jewel Box?

A You could hear parts of conversations, sporadic

conversation.

Q Do you have any recollection at this time of what you heard said inside of Jay's Jewel Box?

A There was some reference to a tape recorder and just parts of conversation which appeared to be negotiations as far as deals.

MR. GRABER: I am going to object to the word, "appeared."

THE COURT: Yes, the question was what you heard.

A If I could refer to the transcript of that tape, that's exactly what I heard.

Q Do you have any recollection of --

MR. GRABER: I am going to object to this.

MR. GEOLY: I object.

THE COURT: Were you about to say something to the witness?

MR. TIMBERS: I believe the witness has indicated that his recollection needs refreshing. I was simply asking him whether, in fact, there are parts of that conversation of which he has no recollection at this time.

THE COURT: Do you have anything to say, Mr. Graber?

MR. GRABER: Your Honor, I objected to the witness' statement just prior to Mr. Timbers' question.

THE COURT: What statement?

* * *

asking him what was said about the tape recorder?

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MR. TIMBERS: I had not asked him for the name of the specific person, but I will be glad to ask him.

BY MR. TIMBERS:

Q How many people were inside Jay's Jewel Box --

MR. GEOLY: Judge, I object unless he was in there himself.

Q -- after they returned from Block's Bar?

A I observed three people enter Jay's Jewel Box.

Q Who were those three people.

A Mr. Finn, Mr. Vitale and Mr. Rizzo.

Q Do you know the voices of any of those three people?

A I knew the voice of Tony Finn.

Q You said something was said about a tape recorder. Who made the comment? Was it Tony Finn or one of the other two individuals?

A I can say it was not Tony Finn that made the statement as to the tape recorder. Who else said it, I couldn't say.

Q By examining the transcript subsequent to that meeting, have you been able to determine which of the two other individuals it was that made the comment about the tape recorder?

MR. GRABER: Objection as to form and substance.

THE COURT: Sustained.

MR. GRABER: Thank you.

BY MR. TIMBERS:

Q Do you now know which one of the two defendants that were inside Jay's Jewelry Box made the initial comment about the tape recorder?

MR. GRABER: I am going to object to that, your Honor. I don't think it's been clearly established that there were only three people in that store at the time.

THE COURT: You are asking him if he now knows who made that statement? How is he to know that?

MR. TIMBERS: I was going to ask him if his answer was affirmative, what it is that has happened since then that has permitted him to determine who it was that made the statement. I can present an offer of proof if your Honor would like.

THE COURT: The witness' testimony was that the only voice that he knows is the voice of Michael Finn; is that your testimony?

THE WITNESS: Tony Finn. Yes, your Honor.

MR. TIMBERS: I believe he testified that at the time the only voice he recognized was Tony Finn.

THE COURT: You want to ask him now about subsequent

events which led him to recognize other voices?

MR. TIMBERS: Correct.

THE COURT: All right.

A I can't say which one of the other guys made the statement. I don't know the gentleman that well, I just couldn't say. It was not Finn. It was somebody else obviously within Jay's Jewel Box.

Q Very good. You said there was a conversation about the terms of the drug deals, I believe.

Does Government's Exhibit 1 for identification refresh your recollection about the exact details of those conversations?

MR. GRABER: I must renew my objection regarding that.

THE COURT: Just one moment, please.

Read the last question and answer, Mr. Reporter.

(Record read.)

MR. GRABER: One, your Honor, I renew my objection to refreshing recollection on the basis of this piece of paper, plus I am objecting to the prior statement prior to the question being asked by Mr. Timbers, the substance of it, and I ask that that be stricken.

THE COURT: Let's get clear what you are objecting to. Read that last question again.

(Question read.)

MR. GRABER: First of all, he begins with a conclusion not in evidence and secondly he's asking him to refer to something which will not refresh his recollection as to who said what, and I think we are entitled to know who said what.

THE COURT: The question to the witness now is whether after looking at Exhibit 1 which is before you, you can now tell us what the substance of the conversation was regarding a drug transaction; is that the question, Mr. Timbers?

MR. TIMBERS: I don't want to put evidence into the witness' mouth. I was simply repeating what I thought the witness had said earlier. He had generally remembered various things, one of which I thought was arrangements for future drug transactions, and I was asking him whether this refreshes his recollection. If there is an objection to my recollection of what his testimony was, I will be glad to have the reporter read back exactly what the witness said earlier he remembered generally.

THE COURT: Ask him again. That would be shorter.

BY MR. TIMBERS:

A Agent Peterson, I asked you sometime ago what recollection you have of what you heard of the transmitter

as the defendants were inside Jay's Jewel Box on the night of May 1st, 1973.

Will you repeat your answer to that question?

A I heard parts of conversation referring to a tape recorder, to money, to deals --

MR. GEOLY: Judge, I must object to this unless he can specify who was saying it.

THE COURT: We will come to that next. Let him tell us generally what he heard and then we will find out if he can tell us who said what.

Proceed.

A And deals and parts of conversations that were suggestions as to how to accomplish the transaction, as to putting money in the safe, leaving the money in the safe, getting the money out. That's about it.

Q How long did Finn and the two defendants stay in Jay's Jewelry Box?

A Just a short while, minutes. Ten, fifteen minutes, twenty minutes.

Q What happened next?

A The three left the bar, they walked down the street to Finn's car, they conversed for a short time. Mr. Rizzo left, Mr. Vitale and Finn got into his car, into Finn's car and drove, made a U-turn, drove back and parked again in front

of Jay's Jewelry Box. They remained here for approximately one half hour, again conversing as to future deals and purity of packages, that sort of thing.

Q When Finn and the defendant Vitale were in the car together, did you hear those conversations over the transmitter?

A Yes, I did.

Q Did you recognize Tony Finn's voice?

Q I recognized Tony's voice.

Q Can you tell the jury what the other voice over the transmitter said?

A Again, I couldn't quote the other voice without the tape or the transcript.

Q Let me ask you to look at Government's Exhibit 1 for identification. I don't want you to read that, but see if that refreshes your recollection in any way as to what you heard when -- what you heard Vitale say when Finn and Vitale were in the car together.

MR. GRABER: I am going to object again, your Honor. It's a problem of voice identification and that piece of paper is going toturn on voice identification no matter what. I must object again.

THE COURT: The question to the witness is whether he heard Finn say certain things at that time.

MR. TIMBERS: No, I believe, your Honor, that the witness has already said that he recognized Finn's voice over his transmitter.

My question was whether the document refreshes his recollection as to what the other person, Vitale said that he heard over the transmitter.

THE COURT: The first question would have to be whether he recalls, has any present recollection as to what Rizzo stated at the time. If he doesn't, then he can look at the document and see whether that refreshes his recollection. If he doesn't we have to move on to there.

MR. GEOLY: Judge, there was no testimony about Rizzo at this point.

THE COURT: Did I call the wrong defendant?

MR. TIMBERS: Yes, your Honor. I think it's Vitale.

MR. GRABER: Your Honor, may we have just a short side bar?

THE COURT: Proceed.

BY MR. TIMBERS:

Q Mr. Peterson, do you have a present recollection of what Vitales said when he was inside the car with Finn?

A Specifically, no.

Q Will you look at Government's Exhibit 1 for

identification and see whether that refreshes your recollection as to what Vitale said when he was in the car with Finn.

(Pause.)

Q Does that document refresh your recollection as to what Vitale said?

A Yes, it does.

Q What is your recollection now?

A They spoke of -- first of all, Finn and the other individual in the car, Mr. Vitale, agreed that they didn't want Mr. Rizzo around because he was -- had a case, is the way they put it.

MR. GEOLY: I move for a mistrial, your Honor. I move for the withdrawal of the jury.

THE COURT: Approach the bench.

(In the robing room.)

THE COURT: Is that in the transcript?

MR. TIMBERS: In fact it is, your Honor. I will pick it out and show it to the Court. It's on page 4. Tony Finn's conversation three up from the bottom.

THE COURT: I will hear the motion.

MR. GEOLY: If your Honor please, in the transcript that we were furnished with, I don't believe that it refers specifically to Mr. Rizzo having another case. I don't think

it mentions him by name.

THE COURT: No, it just says "he".

MR. GEOLY: Now the federal officer has testified in response to a question asked by the U.S. Attorney that the other individual, Vitale, stated he didn't want Rizzo around because he had another case, thereby giving the impression to the jury that either Mr, Rizzo has a conviction or at least a case pending.

THE COURT: What do you say, Mr. Timbers?

MR. TIMBERS: First of all, your Honor, let me apologize. I did not expect that the agent would so testify.

However, I think that it's a matter that does not require a mistrial, because that is part of the conspiratorial conversation. There is no way we are going to get around the fact that the informant and Vitale were talking about the fact that they couldn't afford to deal with Rizzo because he had a case going, and, in fact, the evidence is, although the Government, of course, does not intend to prove it, that Mr. Vitale had -- was convicted of a narcotics violation --

MR. GRABER: Mr. Vitale?

MR. TIMBERS: Mr. Rizzo was convicted I believe in 1972 and went to jail shortly after these transactions in 1973.

THE COURT: His case was pending at the time?

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BY MR. TIMBERS:

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Q Agent Peterson, what happened after the conversation between Finn and Vitale in the car in front of Jay's Jewelry Box?

A Mr. Vitale got out of the car, Finn drove away. I followed him from the area to a predetermined spot. I met with him. He gave me a quanitity of cocaine, approximately one ounce. I searched his person, his car again, no contraband.

Q Did you receive anything else from him beside the cocaine?

A The Kell transmitter and he provided me with Mr. Vitale's business card.

MR. TIMBERS: May this be marked Government's Exhibit 2 for identification?

xxxx (Government's Ehxibit 2 marked for identification.)

Q I show the document that has been marked Government's Exhibit 2 for identification.

Can you identify that document?

A Yes. This is a photostat of the business card.

Q Of which business card is that?

A Of the business card given me by Finn.

MR. GRABER: Your Honor, to this point I must object. I'd like to know where the --

THE COURT: Where is the original?

BY MR. TIMBERS:

Q Mr. Peterson, where is the original?

A I returned the original to Mr. Finn.

MR. GRABER: I must object.

THE COURT: Overruled.

MR. GRABER: Exception.

MR. TIMBERS: The Government offers Government's Exhibit 2 for identification.

MR. GRABER: Again, I object, your Honor.

THE COURT: Overruled.

MR. GRABER: Exception.

xxxc (Government's Exhibit 2 was received in evidence.)

MR. TIMBERS: Ladies and gentlemen, I am passing around Government's Exhibit 2 in evidence.

(Pause.)

Q Agent Peterson, what did you do with the other package that Tony Finn gave you when you met him after the events by Jay's Jewel Box?

A I maintained possession of the package, carried it to the New York Regional Office, where I performed a positive field test for cocaine, weight the package, initialed the package and sealed it in an evidence envelope in the presence of Special Agent Smith.

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Q Agent Peterson, I show you the envelope that is marked Government's Exhibit 3-A for identification. It is stapled to another envelope that has been marked Government's Exhibit 3 - B for identification.

Can you identify the envelope that has been marked Government's Exhibit 3-A for identification?

A Yes, this is the envelope into which I placed the package given to me by Tony Finn on May 1, 1973.

MR. TIMBERS: Ladies and gentlemen of the jury, the stipulation reads as follows:

If Anthony Fonesca were called as a witness in this case he could testify that he has been employed as a chemist by the United States Drug Enforcement Administration at its New York regional laboratory since prior to May, 1973.

He received Government's Exhibit 3-A for identification. Let the record reflect I am pulling Government's Exhibit 3-A and 3-B apart.

He received Government's Exhibit 3-A for identification in a sealed condition on May 9, 1973. On May 9, 1973 he unsealed Government's Ehxibit 3-A for identification and weighed and chemically analyzed the contents. He continuously maintained custody and control of the contents until he placed the contents in Government's Exhibit 3-B for identification, the other envelope. He then sealed the envelope that is

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Government's Ehxibit 3-B.

I am taking the contents of Government's Exhibit 3-B out and I ask that they be marked Government's Exhibit 3 for identification.

xxxx (Government's Exhibit 3 marked for identification.)

BY MR. TIMBERS:

Q Agent Peterson, did you see Tony Finn receive Government's Exhibit 3 for identification on the night of May 1st, 1973?

A Did I see him receive it? No, I did not.

Q Did he have Government's Exhibit 3 on him or was Government's Exhibit 3 for identification in his car at the time you searched his body and car on that night?

A Prior to the transaction?

Q Yes, prior to the transction.

A No.

MR. TIMBERS: The Government offers Government's Exhibit 3 for identification.

MR. GRABER: Your Honor, may I have a voir dire?

THE COURT: Yes.

xxxx VOIR DIRE

BY MR. GRABER:

Q Mr. Peterson, you testified that Mr. Finn entered

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* * *

A Not all of it, no.

Q You don't know exactly what occurred in the bar for a period of some two hours; is that correct, sir?

A Not exactly, no.

MR. GRABER: I object, your Honor.

THE COURT: What do you say, Mr. Timbers?

MR. TIMBERS: Perhaps I could ask one more question.

BY MR. TIMBERS:

Q Agent Peterson, did you hear any discussion about narcotics at the time that Mr. Finn was in the bar?

A Not that I recall, no.

Q The only discussion of narcotics you hears was --

MR. GEOLY: I object to the leading, your Honor.

MR. GRABER: I object to the discussion of narcotics. This man has not so testified.

Q Did you hear narcotics discussed on the night of May 1st, 1973 over the transmitter?

MR. GRABER: I object as to form. I don't think there is a proper foundation been laid here.

THE COURT: Overruled.

MR. GRABER: Exception.

THE COURT: The question is: Did you hear any discussion as to narcotics that night, is that the question,

Mr. Timbers?

MR. TIMBERS: Yes.

A That night, yes, I did.

Q Where was Tony Finn when you heard that discussion? Inside the jewelry store, Jay's Jewel Box, as well as on the street.

Q Who was with him inside Jay's Jewelry Box?

A I observed Mr. Finn enter Jay's Jewel Box with Mr. Vitale and Mr. Rizzo.

Q Who was with Mr. Finn on the street?

A Mr. Vitale and Mr. Rizzo.

Q And who was with Mr. Finn in the car?

A Mr. Vitale.

MR. TIMBERS: Your Honor, would you like me to make my statement from here?

THE COURT: Yes.

MR. TIMBERS: Your Honor, while it is true that Mr. Finn was in both the bar, where he might have possible received the drugs from anyone of a number of people in the bar, all the narcotics conversations that night took place while he was in the company of just the defendants Rizzo and Vitale --

MR. GRABER: Your Honor, I object to this argument in the presence of the jury.

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and Mr. Vitale , he had given him $800 in Government funds, was that the night?

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MR. TIMBERS: Yes, that's correct.

THE COURT: And that he searched him before he met with the defendants Rizzo and Vitale?

MR. TIMBERS: Yes.

THE COURT: To see if he had any narcotics?

MR. TIMBERS: Yes. He gave him the $800 at the time he searched him for narcotics.

THE COURT: And he found no narcotics, is that it?

MR. TIMBERS: At that time, no.

THE COUET: And he gave him $800, is that it?

MR. TIMBERS: That's right.

THE COURT: Did he testify as to why he had given him $800?

MR. TIMBERS: No, I will ask him.

BY MR. TIMBERS:

Q Agent Peterson, what was the purpose of giving Mr. Finn $800 on the night of May 1st, 1973?

A Mr. Finn was to purchase one ounce of cocaine for a price of $800.

Q Who was he to purchase that from?

MR. GRABER: Objection. Unless he knows of his own knowledge.

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THE WITNESS: I told Mr. Finn to meet with Mr. Rizzo at the determined spot and Mr. Rizzo's connection, which was understood there would be one and purchase one ounce of cocaine for $800.

MR. GRABER: Your Honor, may we have a side bar?

THE COURT: No. Overruled, and the exhibit is received.

MR. HOCHHEISER: Your Honor, is that exhibit received and offered as against Philip Lubrano?

THE COURT: We will take that subject to connection as against Lubrano. At the moment it's admitted as against defendants Rizzo and Vitale.

xxxx (Government's Exhibit 3 was received in evidence.)

MR. TIMBERS: Ladies and gentlemen of the jury, the parties have also stipulated that if and Anthony Fonesca, the chemist, were called to testify in this case, he would testify that when he opened Government's Exhibit 3-A for identification, he weighed and chemically analyzed the contests of Government's Exhibit 3. He determined that Government's Exhibit 3 contained 23.5 grams of cocaine hydrochloride.

Your Honor, I have reached the part of the Government's presentation that I described.

THE COURT: All right. The jury is excused until

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unsealed by Assistant United States Attorney Timbers on January 8, 1975.

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BY MR. TIMBERS:

Q Agent Peterson, have you had a chance to listen to Government's Exhibit 6 for identification?

A Yes, I have.

Q Is Government's Exhibit 6 for identification an accurate recording of what you heard over the transmitter on May 1st, 1973?

Q Yes, as accurate as can be, yes.

MR. TIMBERS: The Government offers Government's Exhibit 6 for identification.

THE COURT: Any objection?

MR. GRABER: On the ground as already stated.

THE COURT: Received.

(Government's Exhibit 6 was received in evidence.)

xxxx

MR. HOCHHEISER: Your Honor, I ask for an instruction at this time with regard to the defendant Lubrano. I make a request that if you receive this in evidence only subject to connection at this time, that it is not connected.

THE COURT: With respect to the tape that is about to be played, the Court is accepting that subject to connection to the defendant Lubrano. It is received with respect, at

this time to the defendants Rizzo and Vitale.

MR. TIMBERS: Your Honor, a technical correction. The Government's offer of proof is of only that portion of the tape cassette that is on side one, feet 50 through 143.

THE COURT: All right.

MR. TIMBERS: May this be marked the next Government Exhibit, and this A for that number?

(Government's Exhibit 7 and 7-A marked for identification.)

xxxx

BY MR. TIMBERS:

Q Agent Peterson, has a transcript putting the words on the tape cassette that is Government's Exhibit 6 into writing been prepared?

A Yes, sir, it has.

Q Did you prepare that transcript?

A No, sir, I did not.

Q Have you had a chance to review the transcript?

A Yes, sir, I have.

Q Have you had a chance to listen to the cassette recording?

A Yes, I have.

Q I show you Government's Exhibit 7 for identification. Can you identify Government's Exhibit 7 for identification?

A Yes, sir. This is the transcript of the tape that

was recorded on May list.

Q Are the words in the right-hand column of that transcript an accurate recording of the words that you heard on the tape cassette that is Government's Exhibit 6 for identification?

MR. GRABER: I am going to object to that, your Honor.

THE COURT: Let me hear the last question.

(Question read.)

THE COURT: The words in the right-hand column?

MR. TIMBERS: That's the --

THE COURT: The voice identification?

MR. TIMBERS: No, the voice identification is the left-hand column. The right-hand column is the transcript of what's on the tape.

THE COURT: And the question is: Is that an accurate transcription of what he heard on the tape?

MR. TIMBERS: Correct.

THE COURT: Your objection is what?

MR. GRABER: That is a jury question whether or not that which is on the transcript is in fact on the tape. It's not for the witness to state.

THE COURT: What do you say to that, Mr. Timbers?

MR. TIMBERS: I think the witness has to testify --

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* * *

A Agent Peterson, when you listened to the tape recording, did you recognize Tony Finn's voice?

A Yes, I can recognize Finn's voice.

Q Does that tape recording consist partly of a conversation that you observed Mr. Finn having with Mr. Vitale in an automobile?

A Yes, it does.

Q And during that conversation, can you hear Mr. Finn's voice?

A Yes, sir, I can.

Q Is there another voice on the tape at the point where the two of them are talking in the car?

A Yes, sir, there is.

MR. GRABER: Your Honor, I object to the question.

THE COURT: And did you observe both of them in the car at the same time, is that it?

THE WITNESS: Yes, ma'am.

THE COURT No other person being present?

THE WITNESS: No other person present, yes, ma'am.

THE COURT: All right, it will be received.

MR. GRABER: Just one moment, your Honor. If I may have a voir dire.

THE COURT: Yes.

VOIR DIRE

* * *

* * *

Q There could have been somebody else in that jewelry store without you knowing it; is that correct?

A Possibly.

Q So a portion of this includes conversations in a jewelry store with at least three people there; is that correct?

A The first portion of that does, yes, sir.

MR. GRABER: I would object at this time, your Honor.

xxxx DIRECT EXAMINATION CONTINUED

BY MR. TIMBERS:

Q Agent Peterson, who were the three people in the store?

MR. GRABER: Objection, your Honor. That is not the testimony before this Court.

MR. TIMBERS: I'm sorry.

Q You testified there were at least three people in the store. Who were the three people that you saw in the store?

A I observed three people enter the store. Mr. Finn, Mr. Vitale and Mr. Rizzo.

Q After the part of the conversation in the store, is there a conversation in the street outside the store?

A Yes, sir, there are.

Q Did you observe that conversation?

A Yes, sir, I did.

Q How many people were present during that conversation?

A There were three people present.

Q Who were the three people present?

A Mr. Finn, Mr. Vitale, Mr. Rizzo.

MR. TIMBERS: The Government renews its offer.

MR. GEOLY: I object. There is no testimony there was any conversation heard at that time amongst three people.

THE COURT: The objection is overruled.

What's the number of that, please?

THE CLERK: 7, your Honor.

MR. GRABER: Your Honor, there is one other matter with it. May we go side bar on that? It refers to the proceedings earlier today.

THE COURT: Just one moment.

All right.

(At the side bar.)

MR. GRABER: Your Honor, upon looking this over, I notice that there are certain deletions and I show them to you, on page 2, right in the middle of the page --

MR. TIMBERS: Your Honor, there is just a typographical error. There are all typographical errors, Mr. Graber.

* * *

talking about weight. I'm not talking about this bullshit thing here."

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When a person says, "I'm talking about weight" in that context, does the word "weight" have a special connotation in the drug trade?

MR. GRABER: Your Honor, I'm going to object to the form.

THE COURT: Overruled.

A In reference to weight here, it would mean referring to a relatively large quantity of cocaine in this case.

Q Moving down the page, Vitale speaks, then the informant speaks, Vitale speaks, and then there is another passage by the informant that starts out inaudible.

It says, "I want to buy two (inaudible). I want to buy a ki at a time, ya understand, I don't want no heavy kilogram weight."

In the passage, "I want to buy a ki at a time," does the word "ki" have a special meaning in the narcotics traffic?

A Yes, it does; "ki" is referring to kilogram, which is 2.2 pounds.

Q Agent Peterson, moving on now and directing your attention to late in the month of May, did you take further steps in this investigation?

A Yes, sir, I did.

Q Will you please proceed, please.

A Subsequent to this transaction, I conversed with Mr. Finn. I instructed him to meet with Mr. Vitale and arrange to purchase an eighth kilogram of cocaine. On, I believe, May 8, I'm not certain of the date, Agent Smith and myself established surveillance in a bar in the vicinity of the Whitestone Bridge in The Bronx, Lucky's Bar, I believe. We observed --

Q Can you set the scene, can you tell the jury where abouts you were when you established surveillance?

A We were inside a snall bar, it's called Lucky's Bar. It's on The Bronx side of the Whitestone Bridge.

We were inside the bar, Agent Smith and myself. This was early evening. Mr. Finn was observed to enter the bar alone. He took a seat at the bar. Approximately 15, 20 minutes later Mr. Vitale entered the bar. These two engaged in conversation for approximately 45 minutes, an hour; after which time they left the bar.

They got into their respective vehicles. Mr. Vitale at this time was utilizing the same vehicle that we had observed him use on the first. And both individuals proceeded from the area.

Q Directing your attention to May 10th, 1973, did you

conduct further steps in the investigation of this case?

A Yes, sir, I did. I arranged for a rental. I had duplicate trunk keys make. I arranged for a video tape recorder. I instructed fellow agents to establish surveillance in the vicinity of Canal and Allen Streets, New York City. I met with Mr. Finn. I searched him, the person. I searched his automobile, which was the rental automobile. I fitted him with an electronic transmitting device. I placed into the trunk of the vehicle $3,500. I instructed a fellow agent, Agent Buceti, to drive the vehicle, accompany Mr. Finn to a predetermined spot in the vicinity of the corner of Allen and Canal Streets where they were to park the vehicle in view of the video tape, which was concealed in another vehicle on the street.

I, myself, followed Agent Buceti and Mr. Finn into the area. They parked the car in the predetermined spot. Both individuals got out of the car. Agent Buceti waited on the corner. Mr. Finn entered the East Side Jewelry Exchange, Mr. Vitale's establishment. He was inside a short while after which time he returned to join Agent Buceti. They were subsequently picked up and driven from the area. Shortly thereafter Mr. Vitale was observed to leave his place of business, the East Side Jewelry Exchange, walk to his car --

MR. GRABER: Your Honor, I am just wondering, the

statement of the state, was observed. Was observed by whom? By him or by somebody else.

THE WITNESS: By myself, your Honor.

MR. GRABER: I'm sorry.

A I observed Mr. Vitale to walk to his car, get into his car, drive around, park beside the rental, get out of his car, unlock the trunk, remove the package which I had placed in the trunk, with $3,500 contained in a brown paper bag, got back in his car and drove away in an uptown direction on Allen Street.

Q At the beginning of these events, when you searched Tony Finn, did you find anything on him?

A No, sir, I didn't.

Q When you searched the car, did you find anything in the car?

A No, sir, I didn't.

A Did you give Tony Finn any instructions with regard to the keys?

A I instructed Mr. Finn to take the key to Mr. Vitale and I instructed him to explain to him how the transfer was to take place, and that the money would be placed in the trunk of the car, which would be removed and at a subsequent time the cocaine was to be placed into the trunk of the same car, at which time the car would be picked up.

Q Did you observe money placed in the trunk of the car?

A Yes. I placed the money in the trunk of the car.

Q When did you place the money in the trunk of the car?

A Prior to leaving the office and going to the area.

Q You stated that Tony Finn was wearing an electronic transmitter, I believe. Who, if anybody, was operating the receiving device for that machine?

A At this particular time I was operating the recording device.

Q Did you hear anything that happened over the recorder after the time that Tony got into the car?

A Yes. As I recall, there was a reference to the key and a voice other than Mr. Finn stated, "I'll go get it, I have to go get it,"something to this affect.

Q Was anything else said, that you can recall?

A Not that I recall without hearing the tape.

Q Will you point out on the diagram on the blackboard next to you where it was that the rental car was parked on May 10th?

A On May 10th, as I recall, the rental car was placed on what would be this corner, as I recall, in approximately this area.

Q You are indicating the corner of Allen Street and Canal Street?

A Yes.

Q On which street was it located, Allen or Canal?

A It was on -- excuse me. I'm turned around here. It was located on this corner (indicating). It was parked in an uptown direction on Allen Street.

Q Uptown would be this way, to the right?

A Yes.

Q I have put an X at the spot that you marked, with a 10.

MR. HOCHHEISER: Could we have the record reflect that that is the southeast corner of Allen Street and Canal.

THE COURT: Yes.

BY MR. TIMBERS:

Q Can you show on the diagram where Victore Vitale's place of business, the East Side Jewelry Exchange, was located?

A Yes. It would be in this area (indicating).

Q You have pointed to a square here. Is that the space you are referring to?

A Yes, that is the general area.

Q What happened after Mr. Vitale left the area in his car?

A Surveillance was maintained in this area on the

rental car as well as the establishments in the area until around midnight, at which time subsequent to conversations with Mr. Finn, I terminated the operation for the evening.

I instructed a fellow agent to drive the car from the area, followed by myself, back to the New York office. Once back at the office, myself and fellow agents inspected the trunk of the vehicle and found that the package that I had previously placed into the trunk was, in fact, gone.

Q Was there anything in the trunk at the time you searched it?

A No, sir, there was not, other than the spare and the jack, as you would expect.

Q When you spoke to Finn, did you give him any instructions, any further instructions?

A I instructed him that we would conduct the operation in the same manner the following day.

Q You testified that Tony Finn was wearing an electronic transmitter on this date also. Who was handling the machine that recorded the transmissions?

A On that date I believe I was handling the recording machine.

As I say, there were numerous recorders, hand-held recorders in addition to the big recorder with the tape.

Q What did you do with the tape at the end of the

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ellk (226)

UNITED STATES OF AMERICA

vs. 74 Cr 577

ANTHONY RIZZO, VICTORE VITALE and PHILIP LUBRANO

January 13, 1975
9:50 a.m.

(In open court; jury present.)

M I C H A E L A. P E T E R S O N, resumed.

DIRECT EXAMINATION CONTINUED

BY MR. TIMBERS:

Q Agent Peterson, when we broke on Friday afternoon, I was asking you about the cassette tape recording that was made of the conversations on May 10th, 1973 in which Tony Finn participated.

Who operated the receiving machine on May 10th?

A I was operating the receiver equipped with the recorder as well as a small hand-held receiver.

Q What did you do with the tape at the end of the events you described on Friday?

A I removed the tape from the recorder, placed my initials on it, identifying data, and placed it in a lock sealed envelope and delivered it to the evidence custodian at the New York office.

MR. TIMBERS: May this be marked the next Govern-

ellk Peterson - Direct (227)

ment's Exhibit for identification.

(Government's Exhibit 8 marked for identification.)

Q I show you Government's Exhibit 8 for identification. Can you identify that?

A Yes, sir, I can. This tape bears the case number of this investigation, the date, May 10th, 1973, as well as my initials.

Q Is that the cassette tape recording of the conversation that you recorded on May 10th, 1973?

A Yes, sir, it is.

MR. TIMBERS: Ladies and gentlemen of the jury, the parties in this case have stipulated as follows:

If an appropriate employee of the Drug Enforcement Administration, New York Regional Office, Technical Operations Staff, were called as a witness in this case, he would testify that sometime after May 15, 1973 he unsealed -- May this be marked 8-A for identification the this 8-B for identification?

(Government's Exhibits 8-A and 8-B marked for identification.)

MR. TIMBERS: He unsealed Government's Exhibit 8-A for identification, removed Government's Exhibit 8 for identification, made a duplicate copy of Government's 8 for identification and then sealed Government's Exhibit 8 for

identification in the lock sealed envelope that is Government's Exhibit 8-B for identification.

Q Agent Peterson, I ask you if you can identify the envelope that is marked Government't Exhibit 8-A?

A Yes, sir. This is the envelope into which I placed the tape that I recorded on May 10.

MR. TIMBERS: Ladies and gentlemen of the jury, it is further stipulated that Government's Exhibit 8-B for identification was unsealed by Assistant United States Attorney John Timbers on January 8, 1975. The Government offers the footage from 434 through 454 on side one of Government's Exhibit 8 for identification.

MR. GRABER: If your Honor please, all the objections hereto made regarding the other exhibit to the tape are renewed here.

THE COURT: All right.

xxxx (Government's Exhibit 8 was received in evidence.)

MR. TIMBERS: May this be marked the next Government's Exhibit for identification, it's a 2-page written document.

xxxx (Government's Exhibit 9 marked for identification.)

BY MR. TIMBERS:

Q Agent Peterson, has a transcript been prepared of what is heard on the footage that has just been received into evidence?

Q Yes, it has.

Q Who prepared that transcript?

A I believe Agent Smith, I'm not sure about that.

Q Have you examined the transcript?

A Yes, sir, I have.

Q And have you listened to the tape as you examined the transcript?

A Yes, sir, I have.

Q Is the transcript an accurate rendering of what is said on the transcript, on the tape?

A Yes, sir, I believe it to be.

Q You have before you Government's Exhibit 9 for identification. Can you identify that?

A Yes, sir. This is a transcript of the conversation which was recorded on May 10th, the evening of May 10th.

Q Can you tell the jury where Tony Finn was at the time that this conversation was recorded, the part of the conversation that is set forth in that transcript.

A Inside the East Side Jewelry Exchange, Canal Street.

Q When was that with regard to when the car was

parked on Allen Street?

A This conversation took place after the car had been parked.

Q Did you see who Finn was talking to at the time that the recording that corresponds to that transcript was made?

Q I did not, no.

Q The transcript indicates that some of the passages were spoke by --

MR. GRABER: I am going to object on the form of the question as leading.

Q Did you recognize the voice of Tony Finn on the tape recording?

A Yes, sir, I did.

Q Are the passages on the transcript that are attributed to him instances in which you heard him speaking on the tape recording?

Q Yes, sir, they are.

MR. TIMBERS: The Government offers Government's Exhibit 9 for identification.

MR. GRABER: Objection, your Honor. There is no testimony as to voice identification as to all persons contained within this transcript.

THE COURT: Overruled.

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what he told him but what he told him was based solely and completely, from my reading of the 3500 material, solely on information supplied by Mr. Finn. And I submit to your Honor that has not sufficient evidence here for voice identification, to even create the possibility of an inference on a fact.

* * *

MR. HOCHHEISER: The logic is working in reverse of what your Honor suggested also. Your Honor suggests that the circumstance of Vitale' s actions may give rise to a finding by the jury that this is his voice.

But the transcript is being offered to corroborate or verify that Vitale conducted himself in a certain manner.

MR. TIMBERS: No, it's simply being offered to suggest to the jury what's being offered on the tape. If you wish to prepare your own transcript, your own voice --

MR. HOCHHEISER: I have no obligation to do anything, Mr. Timbers --

THE COURT: The objection is overruled.

(In open court.)

MR. TIMBERS: Ladies and gentlemen of the jury, I am now going to pass out to you the transcript of the May 10, 1973 transcript at the East Side Jewelry Exchange, and we will then play the tape in the same way.

Ladies and gentlemen, you will remember that these earphones are operated by turning on the switch and you can

adjust the volume as necessary for your own hearing.

Also, if you hear a beep in the earphones, put your hand up and we will give you another earphone.

(Tape played.)

BY MR. TIMBERS:

Q Agent Peterson, what happened to the rental car on the night of May 10th?

A It was driven by an agent back to the office and locked in the garage.

Q Was it searched at that time?

A Yes, it was.

Q Was the money in the trunk when it was searched?

A No, sir, it was not.

Q Directing your attention to the next morning, May 11, 1973, what happened to the car that morning?

A The car was again searched and driven back to the same area.

Q Was anything found in it that morning?

A No, sir, it was not.

Q With regard to the diagram on the blackboard, can you show the jury where the car was parked on the morning of May 11 when it was driven back?

A The car was parked here (indicating).

Q Same spot as the day before?

A No. I have obviously been confused here. The day before the car was on this corner. It was on this corner the 11th. It was parked diagonally across. On the second day it wasn't on the same spot. The same intersection, but a different spot.

MR. TIMBERS: May the record reflect that I am --

A This on the 11th and here on the 10th.

MR. TIMBERS: May the record reflect that I am erasing the 10 next the the X on the south side of Canal Street and making an 11 there, and I am putting a 10 on the blackboard next to the other X that Agent Peterson has pointed to.

MR. HOCHHEISER: So the record is clear, your Honor, may I have the record reflect that that is the northwest corner.

THE COURT: Yes.

BY MR. TIMBERS:

Q Will you tell the jury what happened on May 11 when the rental car was parked on Allen Stareet?

A The rental car was parked. The video machine was set up in a position where it could view the car; the various agents maintaining surveillance in this area.

Q What time of the day was the car parked on Allen Street?

A I can't be sure. I believe it was around noon.

Q Who parked it there?

A Agent Buceti, as I recall.

Q What happened next?

A Well, nothing really happened until later that afternoon. As I recall, it was around five or 6 o'clock, Mr. Vitale was observed to leave East Side Jewelry Exchange and drive away, proceeding north. Later, about an hour later, approximately, an individual, a young male, was observed to approach the rental vehicle, unlock the trunk, place a package inside, close the trunk and proceed directly to East Side Jewelry Exchange. A short time thereafter, a few minutes, 10, 15 minutes, Mr. Vitale was observed to again leave the East Side Jewelry Exchange, get in his car and again proceed in an uptown direction.

Q Did you recognize the young male who opened the trunk?

A No, sir, I did not.

Q Have you ever seen him since that date?

A No, sir, I have not.

Q What happened after defendant Vitale drove away?

Q We waited for a short while and I instructed an agent to drive the car under my surveillance back to the New York Regional Office, where we inspected the trunk and

found it to contain approximately one-eighth kilogram --

MR. GRABER: I am going to object, your Honor. There is no foundation for this testimony at this time.

THE COURT: You found it to contain some substance, is that it?

THE WITNESS: Yes, ma'am.

BY MR. TIMBERS:

Q Exactly what did you see in the trunk that night?

A There was a brown paper bag similar to the brown paper bag which I had placed in the trunk. It contained a quantity of white powder, as well as two $100 bills.

Q What happened after the trunk was opened?

A I observed what I just described and as I recall there were some pictures made and then I removed the package and processed it in the same manner as the previous exhibits.

Q Did you place it in a lock sealed envelope?

A Yes, sir, I did.

Q After Vitale drove away on May 11 after the trunk had been opened did you immediately direct the agents to drive the car away or did anything else happen in the interim?

A Which time are you referring to? He drove away twice.

Q On May 11th --

A The first time he drove away?

Q Second time.

You testified that a man, I take it somebody --

MR. GRABER: Your Honor, I am going to object to the form of the questions.

THE COURT: Just one moment. We can't have two lawyers talking at once. Have you finished the question, Mr. Timbers?

MR. TIMBERS: No, I really hadn't, your Honor. The witness seemed confused as to which times I was talking about--

MR. GRABER: I am going to object to that, your Honor.

MR. TIMBERS: And I am simply trying to clarify my question.

THE COURT: Put the question again, please.

BY MR. TIMBERS:

Q You testified that after you observed the young man open the trunk and after you observed Vitale drive away, then you instructed agents to drive the rental car back to the regional office.

Did anything appear before you instructed the agents to drive the car back to the regional office on May 11th?

A I instructed the agent to drive the car away after I had observed Mr. Vitale leave the area and subsequent to

conferring with Mr. Finn the car was driven away.

Q How did you confer with Mr. Finn? Directly, face-to-face?

A By telephone.

MR. TIMBERS: May these two envelopes be marked the next Government's Exhibit, A for the envelope on the front; B for the envelope on the back.

xxxx (Government's Exhibit 10-A and 10-B marked for identification.)

Q Agent Peterson, I show you Government's Exhibit 10-A for identification and ask you whether you can identify that?

A Yes, sir, I can.

Q How can you identify it?

A This is my handwriting and it's the envelope into which the package was placed that I removed from the trunk of the rental car, was placed on May 11th.

Q Is Government's Exhibit 10-A for identification the lock sealed envelope that you placed the brown paper bag and the package of white powder in after you removed them from the car on May 11, 1973?

A That's correct.

MR. TIMBERS: Ladies and gentlemen of the jury, the parties have stipulated that if Anthony Fonesca were

called as a witness in this case he would testify that he has been employed as a chemist by the United States Drug Enforcement Administration at its New York Regional Laboratory since prior to February 1973. He receive Exhibit 10-A for identification in a sealed condition on May 16, 1973.

On May 16, 1973 he unsealed Government's Exhibit 10-A for identification, removed a package therefrom, continuously maintained custody and control of that package until he placed Government's Exhibit, the package, in the envelope that is Government's Exhibit 10-B for identification.

I have torn Government's Exhibit 10-A and 10-B apart. 10-A has an opening in the bottom of it where it's been unsealed. I am now opening Government's Exhibit 10-B.

Mr. Clerk, may the brown paper bag that I have removed from Government's Exhibit 10-A be marked Goverment's Exhibit 10-C and the foil container inside that brown paper bag be marked Government's Exhibit 10.

xxxx (Government's Exhibit 10-C and Government's Exhibit 10 marked for identification.

MR. TIMBERS: Ladies and gentlemen, the stipulation provides that what the chemist removed from this envelope and then put into this evidence was Government's Exhibit 10 and the bag that is Government's Exhibit 10-C.

BY MR. TIMBERS:

Q Agent Peterson, I show you Government's Exhibit 10 and 10-C. Can you identify the brown paper bag that is Government's Exhibit 10-C for identification?

A Yes, sir, I can. It bears my initials and the date 5/11/73.

Q Is that the brown paper bag that you found in the trunk of the rental car on May 11, 1973 when it was opened?

A That's correct.

Q Can you identify Government's Exhibit 10 for identification?

A Yes, I can.

Q How can you identify that?

A It also bears my initials and the date 5/11/73 as well as the case number.

Q Is that the tin foil pacakge contining the white powder that you found inside the brown paper bag that is Government's Exhibit 10-C, when you removed that brown paper bag from the trunk of the rental car on May 11, 1973?

Q Yes, sir, it is.

MR. TIMBERS: The Government offers Government's Exhibit 10-C and 10.

MR. GRABER: May I have a voir dire, your Honor?

THE COURT: Yes.

VOIR DIRE

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gave rise to circumstances whereby the jury could find these were the speakers.

But you see it's a bootstrap operation. Now we are going back to the transcript, which is no foundation at all. That transcript, because it says Vitale said this and that, this transcript is supposed to prove that Vitale caused the action of that thing being in the trunk.

It's a bootstrap operation, but terribly prejudicial.

THE COURT: Overruled.

MR. HOCHHEISER: Your Honor, I don't assume that at this point it's coming in against Lubrano, who has not been mentioned.

MR. GEOLY: We may have an instruction at this point, your Honor. It's not being taken against Rizzo unless and until a conspiracy is shown.

MR. HOCHHEISER: Concerning Lubrano, your Honor, I don't want it subject to connection. Since his name has not been mentioned, I don't want it admitted, period.

THE COURT: It's admitted as to Lubrano subject to connection and also as to Rizzo.

(In open court.)

xxxx (Government's Exhibits 10 and 10-C were received in evidence.)

MR. HOCHHEISER: May I request your Honor that the

Court instruct the jury that this is not yet to be considered against Lubrano unless and until such time as it is legally and properly connected to him.

THE COURT: Yes. The jury is so instructed and the same with respect to Rizzo.

MR. GEOLY: Thank you, your Honor.

MR. TIMBERS: Ladies and gentlemen of the jury, the stipulation that I read to you a minute ago also contains the following paragraph:

"On May 16, 1973, Anthony Fonesca, if he were called, would testify that he unsealed Government's Exhibit 10-A for identification, removed Government's Exhibit 10-C for identification, took out of that Government's Exhibit 10 for identification, weight and chemically analyzed the contents of Government's Exhibit 10 for identification.

"He determined that Government's Exhibit 10 contained 102 grams of cocaine hydrochloride."

May this be marked the next Government's Exhibit for identification.

xxxx (Government's Exhibit 11 marked for identification.)

BY MR. TIMBERS:

Q Agent Peterson, I show you Government's Exhibit 11 for identification. Can you identify Government's

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The jury is viewing a photograph. There are at least some members of the jury who obviously would not be paying attention.

THE COURT: All right. Let them look at it.

MR. TIMBERS: I will be glad to hold off.

(Pause.)

BY MR. TIMBERS:

Q Agent Peterson, did you find anything in the brown paper bag that is Government's Exhibit 10-C besides the package of cocaine that is Government's Exhibit 10?

A Yes, sir. As I said before, there were two $100 bills.

Q What did you do with those two $100 bills?

A I compared the serial numbers of these two bills to the serialized list of money that had been placed into the trunk of the car on the 10th and found them to be two of that same amount of money that had been placed in on the 10th. The serial numbers matched.

Q What did you do with the two $100 bills after you compared them and determined that it was part of the money that you placed in the trunk the preceding day?

A They were placed into evidence envelopes and retained by the evidence custodian.

Q Were these also sealed envelopes?

A Yes, sir.

ellk Peterson - Direct (249)

MR. TIMBERS: May this be marked Government's Exhibit 12 for identification.

xxxx (Government's Exhibit 12 marked for identification.)

Q I show you Government's Exhibit 12 for identification. Can you identify that envelope?

A Yes, sir, I can.

Q How can you identify it?

A It bears the date 5/11/73, the case number, the description of the contents, my initials on the back.

Q Is that the sealed evidence envelope into which you placed the two $100 bills which you found in the brown paper bag on May 11, 1973?

A That's correct.

MR. TIMBERS: Ladies and gentlemen, may the record reflect that I am opening the evidence envelope which is Government's Exhibit 12 for identification. May these two $100 bills be marked the next Government's Exhibit?

xxxx (Government's Exhibit 13 marked for identification.)

MR. TIMBERS: The Government' offers Government's Exhibit 13 for identificaiton.

MR. GRABER: May I have a voir dire, your Honor?

THE COURT: Yes.

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You are offering 13 at this point, the two $100 bills.

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(Government's Exhibit 13 was received in evidence.)

MR. HOCHHEISER: Your Honor, I would object to their receipt as against Mr. Lubrano. There is no evidence as to Mr. Lubrano.

THE COURT: Subject to connection.

MR. GEOLY: May I have the same ruling as to Rizzo, your Honor?

THE COURT: Yes.

xxxx

DIRECT EXAMINATION CONTINUED

BY MR. TIMBERS:

Q Agent Peterson, I show you Government's Exhibit 14 for identification. Can you identify those two pages of paper?

A This appears to be the list of the serial numbers of the money that was placed in the trunk on May 10th.

Q Is that the list that the serial numbers of Government's Exhibit 13 were compared against on the night of May 11, 1973?

A Yes, sir, I believe it is.

MR. TIMBERS: The Government offers Government's Exhibit 14 for identification.

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with the original from the case file.

THE COURT: All right.

(Government's Exhibit 14 was received in evidence.)

MR. HOCHHEISER: Objection to Mr. Lubrano, your Honor.

THE COURT: Yes. Received subject to connection.

MR. GEOLY: Same thing with respect to Mr. Rizzo, your Honor.

THE COURT: Yes.

At this time, ladies and gentlemen, we are going to take a 15-minute break.

Everyone remain seated until the jurors have left the courtroom.

(The jury left the courtroom.)

(Recess.)

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(In open court.)

MR. GRABER: Your Honor, before we proceed, I'd like to wait for Mr. Hochheiser, and I'd like to call your Honor's attention to an event that occurred just outside in the hall a few minutes ago.

THE COURT: All right.

Mr. Geoly, would you get Mr. Hochheiser in room

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(Mr. Geoly left the courtroom.)

(Pause.)

(Mr. Hochheiser present.)

MR. GRABER: If your Honor please, while we were in recess out in the hallway, I observed Agent Fernandez in conversation with two of our jurors: the young lady, the redhead, and I don't recall which other juror, two of the jurors, in which they obviously were asking for coffee, because they did give him money. The agent over my objection, I did attempt to stop him, went in and purchased the coffee in the cafeteria, came out and handed them the coffee and had another conversation with the two jurors.

If your Honor please, Agent Fernandez, although he is not an attorney, is in fact a participant in this trial. He's operated the machines, he's been sitting at counsel table, he's an obvious participant, and on the basis of that and on the bases of possible prejudice to the jury, prejudice that we can not measure at this particular point, I must reluctantly, but I must ask that a mistrial be declared in this matter. The agent had no business going into conversation with these two jurors, and it's highly improper and I don't even know how we can handle it vis-a-vis any possible prejudice, because I don't even know if the

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jurors are aware of any possible prejudice.

However, it's apparent, certainly if I or any of my co-counsel would have done something like that with a matter of weeks we'd be before a federal grand jury to testify as to what occurred. Certainly an agent of the Government has no business --

THE COURT: Please keep your voice down.

MR. GRABER: I apologize.

Your Honor, an agent of the Government has no right or business in conversation with two jurors, and I would object to this and I would ask that a mistrial be declared.

THE COURT: What do you say, Mr. Timbers?

MR. TIMBERS: Your Honor, what happened was that some of the jurors asked the marshall whether he could get them some coffee. The marshall, having to guard the prisoner, asked Agent Fernandez whether he could get the coffee instead of the marshall. Agent Fernandez did speak to the jurors to the extent of asking them whether they wanted black or white coffee. He got the coffee, came back, told the jurors that the container with the mark on it had the black in it and the other one had the white in it.

The Government apologizes for it. I have explained to Agent Fernandez that he should never have any contact with

ellk (256)

the jurors.

However, I would point out that this was done by the -- through the auspices of the marshall. The marshall was the one who was getting the coffee, who is the one who Agent Fernandez was acting with.

I would also make one other point while we are on this matter of contact with the jurors. I also instruct Government agents and everybody involved in the case with the Government to stay out of elevators that the jurors are on.

On Friday I believe it was, I was down in the lobby of the courthouse and one of the elevators from upstairs opened and two pepole got out of it. One was juror number 7 and the other was the defendant Vitale. I don't know what happened in the elevator, but I think the defendants' lawyers should follow the same procedure the Government does and instruct their clients and themselves --

THE COURT: Which juror was that?

MR. TIMBERS: Juror number 7.

MR. GRABER: When was that?

MR. TIMBERS: Either Friday or Thursday.

MR. GRABER: What time of the day?

MR. TIMBERS: I believe it was at the end of the session.

THE COURT: Mr. Vitale, were you on the elevator

* * *

ellk * * * (258)

THE COURT: In the first place, the marshall did not have the permission of this Court to get coffee for the jurors.

MR. GRABER: It wasn't the marshall, your Honor.

THE COURT: Mr. Timbers has explained what occurred, that the marshall undertook to get coffee for jurors, and he didn't have the right to do that. To start getting coffee for jurors because I had declared a 15-minute recess and he didn't know when we were going to reconvene. And, of course, Mr. Fernandez should never have undertaken to do that.

When the jurors were empanelled here I think I told them that they were not to go into that cafeteria, and it follows from that that they are not to get any coffee handed to them by anybody unless the Court authorizes it.

One day last week when they were sitting in there I told the clerk that he might get coffee for them because they had been in there for almost two hours at that point. Obviously nobody is to have any connumication with jurors, including marshalls, unless the Court instructs it.

In view of all the circumstances as explained here, the motion for mistrial will have to be denied, because the action was not so prejudicial as to deny the defendants a fair trial.

MR. GEOLY: Judge, that motion is made on behalf

ellk (259)

of all the defendants.

THE COURT: Yes, we have agreed on that from the beginning, that any motion made by one defendant is made on behalf of all.

Bring in the jurors.

MR. TIMBERS: I have instructed Agent Fernandez that what he did was improper and it should never be done again. I would ask your Honor that you also instruct the defendants to stay out of contact with the jurors and if a juror gets into an elevator that they are in --

THE COURT: You heard what the clerk says and he knows that's what he's to do. Each time the jurors have left, he has seen them on to the elevator, with no one else. It must be clear to the defendants that they are not to get onto the elevators with jurors.

(The jury entered the courtroom.)

MR. HOCHHEISER: We all join in Mr. Graber's motion.

THE COURT: You may proceed, Mr. Timbers.

MR. TIMBERS: Ladies and gentlemen of the jury, I am going to hand to you Government's Exhibit 13 and 14 --

MR. GRABER: Your Honor, I would object to 14 being shown to the jury until we get the original.

THE COURT: Yes, and I think that if the jurors

want to look at any exhibit they can send for it when they go into the jury room. We are not going to pass anything else to the jurors. So take those two things back. If they want to see an exhibit, they will be instructed that they can send for any exhibit they want to see when they retire to the jury room to deliberate.

Let's proceed.

BY MR. TIMBERS:

Q Agent Peterson, directing your attention to the middle of August, 1973, what if anything else did you do in connection with this case?

A I believe it was around August 20th I instructed Mr. Finn to purchase an eighth kilogram of cocaine from an individual known at that time to me only as Philly.

MR. HOCHHEISER: Your Honor, I am going to object to this because this really brings in a hearsay aspect to the case.

When the agent says, "I told him to purchase it from someone known to me as Philly."

THE COURT: Overruled.

A Myself and Agent Smith met with Mr. Finn, where we searched him, fitted him with the electronic transmitting device, seached his vehicle --

MR. HOCHHEISER: Your Honor, may we approach the

bench before we proceed further?

(At the side bar.)

MR. HOCHHEISER: The transcripts for August 20 and October 4 show that the conversations are inaudible and your Honor has so ruled. He's now testifying that he's fixing up this informant with a transmitter. I submit to your Honor in view of what we all saw quite clearly and plainly from the tapes, that this transmission was incapable of being properly overheard and voices being identified. I would certainly find it a Pyrrhic victory indeed to have the tapes suppressed on the ground that the transmission didn't have sufficient quality and then have the agent testify that they overhead and identified voices, etcetera, etcetera. That would be accomplishing indirectly which your Honor has ruled quite correctly ought not be done directly.

MR. TIMBERS: Your Honor, I don't think we have had any testimony of what the quality of the reception was as far as the agents heard. I just don't see how Mr. Hochheiser can contend agents can not testify as to what they heard over the transmitter.

THE COURT: We have ruled out both of those on the ground the tapes were inaudible.

MR. HOCHHEISER: And now Mr. Timbers is saying by implication what they heard on the monitor is clearer than

what the tapes sounded like in this courtroom. What he has to say is that little hand-held device gave them clearer reception to their ears on the street than this highly sophisticated instrument in this court has on the tape.

What's my defense to that charge? I must just walk out now.

MR. TIMBERS: That is not true.

First of all, the reception is on the hand-held recorders and on the machine, the agent was listening to the tape, as indicated the way this operates, has the machine which is a sophisticated machine, he has the recorder which he can move the antenna in such a way as to best pick up the signal. And I would think, and the testimony will be, that a person could hear through that combination of receiving devices better than what is played back on the tape because of course the tape does not pick up as clearly as the actual reception.

MR. HOCHHEISER: Oh, really?

MR. GRABER: Am I to understand, your Honor, that Mr. Timbers has not in the privacy of his office discussed the testimony of the witness with this witness, because he keeps repeating that he doesn't know what he is going to say and I would assume that any lawyer how is prepared the case has discussed the questions and the answers he is going to

elicit. This has been going on consistently. I assume Mr. Timbers has spoke to the agent and I assume he has asked him these questions.

THE COURT: Are there details relating to these two dates?

MR. TIMBERS: Yes, there are. One is charged in the indictment. The other is presented only as evidence of the conspiracy, not as a substantive count.

MR. HOCHHEISER: There is only one way to prove to the jury at this point that the officer is not being candid with them when he says he overhead it on this device, which is now being characterized as sophisticated although the stuff in the office that we heard it on is termed unsophisticated.

In order to disprove the officer's testmony, I would have to introduce the tapes and the transcripts that I spent so much time to get suppressed because they are totally inaudible. I don't believe this Court should tolerate testimony from this officer that in the street he got better reception than we got in this courtroom on this equipment. That would be a travesty and I have no defense. I might just as well throw in the towel.

THE COURT: It's up to the jury to believe them or not, in view of your arguing.

MR. HOCHHEISER: What's my argument? I have to play the tapes that are already suppressed, I have to show transcripts to show that this has been done? I'm in a terrible position. They will think this conversation was clearer than what they heard over --

THE COURT: Overruled.

(In open court.)

BY MR. TIMBERS:

Q When you searched Finn's car, did you find anything inside?

A No, sir, we did not. No contraband.

Q Did you give Mr. Finn any instructions at the time you searched his car?

A Yes, I did. I --

MR. HOCHHEISER: Your Honor, I am going to object to the instructions that he gave Finn, because that gives the jury the inference that Finn probably followed the instructions.

All that is inadmissible in this courtroom, your Honor, because I can't examine Finn, is what Finn did, not what this agent told Finn to do.

THE COURT: No, the agent may testify as to what he told Finn, because he's here to be cross-examined as to what he told Finn.

Overruled.

A I provided Finn with $3,750 serialized official funds and instructed him to purchase one-eighth kilogram of cocaine from this individual known to me at this time as Philly.

Q What happened after that?

A Myself and Agent Smith followed Mr. Finn to the vicinity of 56th Street and Lexington Avenue. He parked his car and entered into a bar just off the corner of 56th and Lexington. I believe it's the Gion Bar.

Q You testified you followed him. Did he stop at any point between where you left him and when he parked the car?

A No, sir, he did not.

Q What happened after Tony Finn entered the Gion Bar?

A A short while after observing Mr. Finn in the bar, I observed an individual later identified to be Philip Lubrano exit a doorway about two doors east of the bar, as I recall, and enter the bar.

Q Where was that doorway with regard to the Kat Vin Jewelry Store?

A As I recall, the doorway was just east of Kat Vin Jewelry, an adjacent doorway, as I recall.

Q Is the person that you saw leave the doorway next to the Kat Vin Jewelry Store in the courtroom today?

I followed him from the area, met with him at which time he provided me with a package. It contained a quantity of white powder.

MR. TIMBERS: May this be marked the next Government's Exhibit for identification.

(Government's Exhibit 15 marked for identification.)

xxxx

Q Agent Peterson, I show you Goernment's Exhibit 15 for identification and ask you whether you can identify that plastic envelope?

A Yes, sir, I can.

Q How can you identify it?

A It shows the date of seizure, 8/20/73, my name, my signature, the case number.

Q Is that the plastic bag into which you put the bag that Anthony Finn gave you on August 20, 1973, and then sealed that plastic bag?

A Yes, sir, that's correct.

MR. TIMBERS: May the record refelct that I am cutting open Government's Exhibit 15 for identification at this time; and I am taking out from it a baggy containing a white powder which I ask be marked Goverment's Exhibit -- I'm sorry, can the baggy be marked Government's Exhibit 15 and the covering envelopes be remarked Government's Exhibit

15-A.

(Government's Exhibits 15 and 15-A marked for identificaiton.)

MR. TIMBERS: Ladies and gentlemen of the jury, the parties have stipulated as follows:

"If Anthony Fonesca were called as a witness in this case he would testify that he has been employed as a chemist by the United States Drug Enforcement Administration at its New York Regional Laboratory since prior to May, 1973.

"He received Government's Exhibit 15-A for identification in a sealed condition prior to August 24, 1973. On August 24, 1973, he unsealed Government's Exhibit 15 for identification, weighed and chemically analyzed the contents of Government's Exhibit 15 for identification and then resealed Government's Exhibit 15-A for identification."

BY MR. TIMBERS:

Q Agent Peterson, I show you Government's Exhibit 15 for identification. Can you identify that?

A Yes, I can. The package bears my initials and date 8/20/73.

Q Is that the package that Tony Finn gave you when you met him at that prearranged location after the events at the Gaiety East Luncheonette that you just described?

A Yes, sir, it is.

ellk Peterson - Direct/Voir Dire (269)

MT. TIMBERS: The Government offers Government's Exhibit 15 for identification.

MR. HOCHHEISER: Objection, your Honor. May I have a voir dire?

THE COURT: Yes.

xxxx VOIR DIRE

BY MR. HOCHHEISER:

Q Mr. Peterson, I show you Government's Exhibit 15 for identification. Is this the package that you say that Mr. Finn gave you after you saw an obvious bulge in his pocket?

A That's correct.

Q He had this package in his trouser pocket and it made a bulge so obvious that you could see it from where you were positioned?

A That's correct.

Q Where were you positioned, sir?

A Directly across the street.

Q You saw this obvious bulge from across the street?

A Yes, sir, I did.

Q What street was that?

A Lexington Avenue.

MR. TIMBERS: Your Honor, I think we are getting out of the voir dire range on this examination. This perhaps

is range for cross-examination.

THE COURT: Yes.

BY MR. HOCHHEISER:

Q Can you tell us of your own knowledge who gave this to Mr. Finn?

A I can not.

MR. HOCHHEISER: Thank you. I object to the introduction of this against Mr. Lubrano.

THE COURT: Overruled.

MR. HOCHHEISER: Your Honor, may I ask two more questions?

THE COURT: Yes.

BY MR. HOCHHEISER:

Q Agent Peterson, this luncheonette that you saw Mr. Finn was in with Mr. Lubrano, was there any persons in it?

A Yes, sir.

MR. TIMBERS: Your Honor, we are getting out of the range of voir dire on this exhibit.

THE COURT: Cross-examination, yes.

MR. TIMBERS: And cross-examination comes later. I therefore object to these questions.

THE COURT: Yes. These questions are more properly put on cross-examination.

MR. HOCHHEISER: They would be, your Honor, if there was some basis for introducing this evidence. I am trying to establish --

MR. TIMBERS: Objection, your Honor.

MR. HOCHHEISER: The man says he doesn't know of his own knowledge who gave this to Mr. Finn. There were no circumstances connecting this with Mr. Lubrano.

MR. TIMBERS: Your Honor, they were in a restaurant together for about three minutes. I think that is sufficient connection.

THE COURT: Yes, it is.

MR. HOCHHEISER: Were there other people in the restaurant --

MR. TIMBERS: Objection, your Honor.

THE COURT: Those are cross-examination questions. The exhibit is admitted.

MR. HOCHHEISER: I respectfully object to the curtailment of the voir dire and the admission of the exhibit.

MR. GRABER: If your Honor please, I would ask for a limiting charge to the jury regarding Mr. Vitale.

MR. GEOLY: Same request for Rizzo, your Honor.

THE COURT: It's subject to connection to Rizzo and Vitale.

(Government's Exhibit 15 was received in evidence.)

xxxx

MR. TIMBERS: Ladies and gentlemen of the jury, the stipulation futher provides that if Anthony Fonesca were called as a witness in this case he would testify after giving his employment that on August 24, 1973 he unsealed Government's Exhibit 15-A for identification, opened the paper bag -- I'm sorry, the clear plastic bag on Government's Exhibit 51, weighed and chemically analyzed the contents of Government's Exhibit 15. He determined that Government's Exhibit 15 contained 112.2 grams of cocaine hydrochloride.

BY MR. TIMBERS:

Q Agent Peterson, directing your attention to October, 1973, did you do anything else in connection with this case?

A Yes, sir, I did. I met with Mr. --

MR. GRABER: If your Honor please, I object to the form of the question as indicating that this case, meaning all the events that he's testified to, when there has really been no establishment of any connection between any of the events. I would object to the form and ask that it be stricken.

THE COURT: Overruled.

MR. GRABER: Exception.

A I met with Mr. Finn just prior to I believe October 4 and instructed him to meet with Mr. Lubrano and

agree to purchase a quarter kilogram of cocaine. I subsequently met with Mr. Finn and instructed him to on October 4th, to meet with Mr. Lubrano and determine whether in fact Mr. Lubrano had a quarter kilo of cocaine for immediately sale.

MR. HOCHHEISER: Your Honor, again I am going to object. This is just a ruse to enable this jury to hear implicitly what this agent is really telling him the informant told him. That is what he says, couched in different language, what he told the informant to do --

THE COURT: No, we have been over this objection previously. It is not hearsay because what the witness is testifying to is statement that he made out of court and since he is here to be cross-examined as to his own statements it is not hearsay.

Overruled.

BY MR. TIMBERS:

Q Proceed, Agent Peterson.

A I met with Mr. Finn, myself and Agent Simpson. We searched him, searched his vehicle, gave him $6,400. I had previously arranged, instructed agents to initiate surveillance in the vicinity of 56th Street and Lexington Avenue. Myself and Agent Simpson followed Mr. Finn to this vicinity. He parked is vehicle on 56th Street just east of Lexington

Avenue, walked south on Lexington Avenue on the east side of the street. As he was proceeding out, I observed Mr. Lubrano to be walking south on the west side of Lexington Avenue. Mr. Finn proceeded to the corner of 55th Street and Lexington Avenue and proceeded west on 55th Street. Mr. Lubrano crossed Lexinton Avenue midway between 55 and 56th, crossing from west to east, turned east on 55th and entered an apartment building. I recall the address, I believe 141 East 55th Street.

Mr. Finn proceeded west on 55th Street for approximately half a block, at which time he turned around, walked back east on 55th street and entered the same building, 141 East 55th Street. He remained inside for a short while, 20, 30 minutes, at which time he came out of the building, proceeded to his car and drove from the area.

I must explain. I am getting ahead of myself. It was at this time that I gave Mr. Finn the $6,400, not prior to going up; I'm sorry.

The second time, after he had been in the apartment, I met with him, I gave him $6,400 and instructed him to purchase a quarter kilogram of cocaine. At this time he was searched again --

Q Excuse me. Did Mr. Finn say anything to you when you met him at that prearranged location?

ellk Peterson - Direct (275)

MR. HOCHHEISER: I have to object to this, your Honor.

THE COURT: Are you asking him to tell us what Finn said?

MR. TIMBERS: No.

A We had a conversation. And as a result of this conversation I gave Mr. Finn $6,400 and instructed him to purchase a quarter Kilogram of cocaine from Mr. Lubrano.

MR. HOCHHEISER: I object to this, your Honor. What is this jury supposed to infer from the statement that as a result of the conversation I gave him $6,400.

We have a conversation implicitly in here from a man who isn't going to testify. What am I supposed to do with that.

THE COURT: Overruled.

A At the time Mr. Finn and his automobile were again searched, finding no contraband. He was returned to 141 East 55th Street under constant surveillance, entered the building again, remained inside for a short while, 15 minutes or so, at which time he came out of the building. This time he came out of the building, he was carrying a cylinder about a foot, foot and a half long and about an inch or so in diameter, a foil cylinder.

He walked to the corner of Lexington Avenue and

55th, walked north on Lexington, turned east on 56th Street, at which time he walked down into a stairwell off the street. I was directly behind, myself and Agent Smith were directly behind Mr. Finn at this time. We followed him into the stairwell, at which time he gave us the foil cylinder.

Q What did you do with that foil cylinder?

A The foil cylinder, as I recall, custody of it was maintained by Agent Smith, as I recall. It was processed in the same manner as previous exhibits.

MR. TIMBERS: May this envelope be marked the next Government Exhibit for identification with the suffix A after it.

xxxx (Government's Exhibit 16-A marked for identification.)

Q Agent Peterson, I show you the envelope that has been marked Government's Exhibit 16-A for identification. It is a clear envelope. I ask you to look inside it and tell me if you can identify what is inside Government's Exhibit 16-A .

A Yes, this is the package which myself and Agent Smith received from Mr. Finn on October 4. It bears my name, the date October 4, the fact that the receiving official was myself.

A Did you observe Mr. Smith put the contents of

Government's Exhibit 16-A into the envelope that is Government's Exhibit 16-A?

A Yes, sir, I did.

Q Did you put your initials on Government's Exhibit 16-A?

A Yes, sir, I did.

MR. TIMBERS: Ladies and gentlemen of the jury, the parties have stipulated that if Anthony Fonesca were called as a witness in this case, he would testify that he has been employed as a chemist at the United States Drug Enforcement Administration in its New York Regional Laboratory since prior to May, 1973. He received the envelope that is Government's Exhibit 16-A for identification --

MR. GRABER: If your Honor please, this stipulation does not apply to the testimony of this witness who said that he did not handle this exhibit. He said Finn gave it to him, but in terms of the processing to which the stipulation refers, refers to Agent Smith and not Mr. Peterson.

And at this time I must respectfully object to the reading in of this particular stipulation without the testimony of Agent Finn that he's the one who processed it --

THE COURT: Smith.

MR. GRABER: Smith, I'm sorry.

MR. TIMBERS: Your Honor, I believe Agent Peterson

testified that he was present at the time of sealing, but I will ask him again.

THE COURT: Yes, he so testified. He testified that he watched Smith put the contents in that Exhibit 16-A; is that what you are about to ask him?

MR. TIMBERS: Yes.

THE COURT: He's already testified to that.

THE WITNESS: That's correct, your Honor.

MR. TIMBERS: Ladies and gentlemen of the jury, I believe I had stopped off where the stipulation reads that Anthony Fonesca would testify that he has been employed as a chemist by the United Stated Drug Enforcement Administration at its New York Regional Laboratories since prior to May, 1973. He received the envelope which is Government's Exhibit 16-A for identification in a sealed condition on October 11, 1973. On October 11, 1973 he unsealed Government's Exhibit 16-A for identification, removed the contents of that. He continuously maintained custody and control of the contents until he placed the contents back in the envelope that is Government's Exhibit 16-A for identification and resealed that envelope.

May the record reflect that I am now cutting open Government's Exhibit 16-A and I ask that the cylinder and foil wrapping be marked Government's Exhibit 16 and that the other

things inside the package be deemed also marked Government's Exhibit 16. There are several packages inside and it would be difficult to mark them all.

(Goverment's Exhibit 16 marked for identification.)

MR. HOCHHEISER: Objection, your Honor. I request a voir dire.

VOIR DIRE

BY MR. HOCHHEISER:

Q Mr. Peterson, you didn't see who gave Exhibit 16 for identification to Mr. Finn, did you?

A Did I see who gave it to him?

Q Yes, sir.

A No, sir, I did not.

Q To your knowledge, may I correctly presume nobody found my clients fingerprints on any of this stuff here?

A Not to my knowledge. I would not know.

Q Can you tell this jury, Mr. Peterson, of your own knowledge where Mr. Finn or from whom Mr. Finn acquired that, from your own knowledge.

A I'm not sure I understand the question.

Q You know what I mean when I say from your own knowledge, something that you yourself observed --

A I did not see Mr. Finn receive that package.

ellk Peterson - Voir Dire (280)

Q So from your own knowledge you can not testify that Mr. Lubrano gave it to him; is not that true?

A If I understand your question, that's true.

MR. HOCHHEISER: I object to the introduction of this, your Honor.

THE COURT: Overruled.

MR. GRABER: Your Honor, may I have a limiting change regarding Mr. Vitale?

THE COURT: Yes, this is taken subject to connection regarding Mr. Rizzo and Mr. Vitale.

MR. HOCHHEISER: Is your Honor's ruling that it's sufficiently connected to Mr. Lubrano at this time?

THE COURT: Yes.

(Government's Exhibit 16 was received in evidence.)

xxxx

MR. HOCHHEISER: Your Honor, may I press the objection at the side bar with further argument that perhaps ought not to be given in front of the jury?

THE COURT: All right.

(At the side bar.)

MR. HOCHHEISER: Your Honor, the only testimony about Exhibit 16 is that they saw Mr. Lubrano and Mr. Finn go into the same large New York City apartment building, not even together. They don't even have any testimony that they

went into the same apartment. There is absolutely no evidence that Mr. Lubrano gave or caused the transfer of Exhibit 16 to Mr. Finn. Respectfully, your Honor, this can't be done this way.

THE COURT: What do you say, Mr. Timbers?

MR. TIMBERS: Your Honor, the only evidence the Government has of this transaction is that the defendant Lubrano walked into the apartment and minutes later the defendant Finn walked into the apartment --

MR. HOCHHEISER: Apartment or building?

MR. TIMBERS: I'm sorry, building.

MR. HOCHHEISER: How many apartments roughly are in the building? Can you state that? It's a large building.

MR. TIMBERS: No. There has been no testimony that Lubrano left thereafter. And Finn, of course, came out of the apartment after he had entered shortly after Lubrano. And then after meeting with the agent received the money, went back up in the apartment again and came out again.

MR. HOCHHEISER: There is no evidence between Mr. Lubrano and any apartment in the building.

THE COURT: Overruled.

(In open court.)

BY MR. TIMBERS:

Q Agent Peterson, did you search Tony Finn when you

met him in the stairwell after he had been up in the apartment building the second time?

A That's correct.

Q Did he have the $6,400 on him that you had given to him at the time you previously met him?

A No, sir, he did not. Not to my knowledge.

MR. TIMBERS: The Government has no further questions of this witness at this time.

MR. GRABER: Your Honor, may we approach the side bar?

THE COURT: All right.

(At the side bar.)

MR. TIMBERS: Your Honor, due to a witness scheduling problem, the Government would like to put on a witness at this point out of order simply because he has to leave New York City at the end of the day. I believe we are all agreed that he can go on at this time and therefore we ask the Court's permission to allow Henry Klein to testify at this time. I hope he's a fairly short witness.

THE COURT: Any objection?

MR. GRABER: No, we have no objection. Mr. Timbers had spoken to us ealier about that and we understand the problem. We have no objection whatever. We'd like it if it's going to be done now, we'd rather not break up

cross-examination of this witness. So if it can be done now, that is perfectly acceptable. Hopefully he will be a short witness, we don't know.

THE COURT: All right.

(In open court.)

THE COURT: Ladies and gentlemen, normally at this time the defense counsel would porceed to cross-examine the witness who has just testified. However, in order to accommodate another witness who must leave the city today, we are going to suspend the cross-examination at this time and put on this witness.

You may come down for the present, Mr. Peterson.

(Witness steps down..

THE COURT: Would you call the new witness?

MR. TIMBERS: The Government calls Henry Klein.

H E N R Y S. K L E I N, called as a witness by the Government, having first been duly sworn, testified as follows:

xxxx DIRECT EXAMINATION

BY MR. TIMBERS:

Q Mr. Klein, by whom are you employed?

A With the Drug Enforcement Administration.

Q What is your position with them?

A I am a special agent assigned to the technical

operations unit.

Q What are your duties in that position?

A I am in charge of all photographic and video surveillance work done out of the New York office.

Q Were you so employed in May of 1973?

A Yes, I was.

Q Have you received special training in the operation of video tape equipment?

A Yes, I have.

Q Will you describe the training to the jury?

A I have taken a course in instruction at the Sony School in video camera maintenance and operation.

Q What if any practical experience have you had operating video tape equipment?

A I have used video tape equipment on at least 40 to 50 occasions. I have used video tape equipment extensively at night. To that extent I have lectured on the use of video tape equipment in low light work.

Q Did you participate in the investigation of this case?

A Yes, I did.

Q Did you use video tape cameras in connection with what you did on this?

A Yes, I did.

Q Will you tell the jury how the video tape cameras that you used in connection with this case operated?

A Yes, what we used on this case was a standard video setup composed of three basic parts. The camera itself, a recorder and a monitor.

Everything that is photographed or taken on the camera is recorded on the video tape recorder for future playback and the monitor allows people other than yourself to view what is going on while we use the tape. We also use the monitor because it gives you a better image than what you see on the camera. The camera has a view finder in which you see what's on the tape.

Q With respect to May 10, 1973, will you tell the jury what you did in connection with this case?

A On May 10 I was approached by Group Assistant Supervisor White and asked to set up a video surveillance on Allen Street. I believe it was Allen near Canal Streets.

In company with another special from that group we take an undercover van and set up our equipment on Allen Street, it was on the east side of the street, north of Canal Street. We set up on a U. C. vehicle, an undercover vehicle on the trunk of that vehicle.

Q I direct your attention to the diagram that is to your left. Will you point to the square if you can whereabout

it is on that diagram, you parked on May 10th? For your orientation the right is north. This is Canal Street coming down and this is Allen Street --

MR. GRABER: Your Honor, I object to the instructions by Mr. Timbers. If this aids the witness, he can certainly testify. Mr. Timbers statements are not evidence and I object to it.

THE COURT: All right. Let the witness tell us if this aids him in determining where the vehicle was located.

A Our vehicle would have been parked right about here on the 10th (indicating).

MR. TIMBERS: I will put a square there. I will put a 10 right inside that.

Q What did you do after the vehicle had been parked across the street from the undercover car?

A We set the equipment up, aimed it at the trunk of that car. We shot video tape of that car. Then as a practice, we shot video tape of some of the buildings around the car to use as a reference. We aimed the camera at the trunk of that car and for a good deal of time anybody who approached the car who we took to look suspicious and that could be anybody, we started the camera in operation and photographed that person.

MR. GRABER: First of all, I would object to the

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* * *

He's seen all the tapes.

MR. GRABER: Are you representing that? Okay.

THE COURT Let's proceed.

(In open court.)

BY MR. TIMBERS:

Q Will you tell the jury exactly what your precise instructions were so far as photographing people that approached the car?

A Simply to the fact that anyone approached the car or looked like they were coming to the car, to start the camera. Shut the camera off if they went by the car.

Q Will you continue with what you photographed.

A We photographed a few people coming by the car. Later, a truck pulled up and blocked our view of the trunk of the undercover vehicle and through the window of the truck we saw the trunk of the undercover vehicle being lifted up by somebody. The truck was closed, the person walked toward the camera --

Q Perhaps I misheard. I thought you said the truck was closed.

A The trunk was closed, we could see that through the window of the truck which was blocking.

Then the person walked to the street side, toward our truck, revealed themselves in front of the truck that was

blocking our view and walked toward another car and got in the car and drove away. We photographed this.

Q Did you see anybody else besides that individual you have just described open the trunk of the car on May 10?

A No, I did not, sir.

Q Did you have the car under constant surveillance for all the time that you described?

A Yes, sir.

Q Directing your attention to May 11, 1973, what, if anything, did you do in connection with the case on that day?

A On that day the undercover vehicle was parked on Allen Street, a little south of Canal on the east side of the street. We set up near Division Street, which is one block down from Canal, on the same side of the street, with our camera focused on the trunk of the undercover car.

Q Can you point to the square where on the diagram that is on the blackboard next to you you parked on May 11, 1973?

A It would be right about there, with a line of sight to the trunk of the car where the X is.

MR. TIMBERS: May the record refelct that I am drawing a square on the blackboard where Agent Klein pointed and I am putting an 11 inside the square.

Q Will you tell the jury what, if anything, you did after the van was parked?

A When the van was parked and in place a parking spot was made available by the movement of another one of our cars. The U.C. vehicle was parked by one of the undercover agents. He got out of the undercover car and left the scene. Then I set the camera up, I photographed that with the camera. Then about 15, 20 minutes later we got a parking ticket for a expired meter and I photographed that.

Q That was the car or the van?

A The car got the ticket, the undercover car. We continued to photograph and I scanned the whole area again as is my policy to see where we were located. A wide angle shot of the area. Then a while later a young male approached the trunk of the car, opened the trunk of the car, put something in, closed the trunk of the car, went to the front of the car, crossed Allen Street and I lost him when he was going down Canal Street.

Q When you say, "going down Canal Street," was he going on the diagram that we have on the blackboard up or down?

Q West, he was heading west. He crossed here and I lost him there. I can not say exactly where he went.

Then one of our undercover agents, another under-

cover agent, got into the car and drove it away.

MR. TIMBERS: May this envelope be marked the next Government exhibit with the suffix B.

xxxx (Government's Exhibit 17-b marked for identification.)

MR. TIMBLRS: May the record reflect that I am cutting open Government's Exhibit 17-B for identification. May the reel that is inside Government's Exhibit 17-B for identification be marked Government's Exhibit 17 for identification and may the envelope inside Government's Exhibit 17-B for identification be marked Government's Exhibit 17-A for identification.

xxxx (Government's Exhibits 17 and 17-A marked for identification.)

BY MR. TIMBERS:

A Agent Klein, I show you the box containing Government's Exhibit 17 for identification.

Can you open that box and take out the reel that is inside and tell me whether you can identify Government's Exhibit 17 for identification?

A Yes, I can.

Q How can you identify that?

A It bears my -- inscribed and scratched in it is my group, name, the group I was doing the case for, Group 23,

and the date, 5/10/73 to 5/11/73.

Q When did you scratch that information on to Government's Exhibit 17?

A I can only say it was either when I put the reel on or when I took the reel off. In this case it must be when I took the reel off the machine.

Q What did you do with the reel after you took it off the machine?

A I would have copies it immediately and turned it over to one of the agents of Group 23. I'd have to see the evidence envelope to refresh my recollection.

(Handing.)

A This was give to S.A. Smith, who was in the van with me at the time I was making the video tapes. This was turned over to him for safekeeping.

Q Did you open Government's Exhibit 17-A for identification?

A Did I open it?

Q Yes. It has been opened, hasn't it?

A Right, it has been opened.

Yes. I opened this to make the copy and we received it in one of the new type evidence envelopes.

Q Is Government's Exhibit 17 the video tape that you used when photographing the May 10 and May 11 events that you

have described here in your testimony?

A Yes, it is.

Q Have you looked at the broadcast of Government's Exhibit 17?

A I have looked at a duplicate copy of Government's Exhibit 17 recently, the copy I was mentioning that I had made from the original tape.

Q Did that duplicate copy accurately record the events that you have just described photographing on May 10 and 11, 1973?

A Yes, it was an exact representation of what I saw.

MR. TIMBERS: The Government has no furhter questions of this witness at this time.

THE COURT: Any cross-examinaton of this witness?

MR. GRABER: Is he offering it in evidence?

MR. TIMBERS: Not unless he will stipulate that Agent Smith would testify that he saw it.

THE COURT: In other words, 17 is not being offered at this time?

MR. TIMBERS: We need one more link to tie it in, your Honor.

xxxx CROSS-EXAMINATION

BY MR. GRABER:

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* * *

Drug Enforcement Administration investigating Mr. Lubrano here, did you ever take the trouble, apart from the incidents involving Mr. Finn, did you ever take the trouble to personally like follow Mr. Lubrano, see if he sells cocaine to other people?

A Yes, sir, there were several surveillances of Mr. Lubrano's activities.

Q Did you ever catch Mr. Lubrano selling cocaine to anybody but Mr. Finn?

A I didn't catch him no, sir.

Q Do you think Mr. Finn was his only customer?

A Do I think that?

Q Yes.

A No, sir.

Q And the only cocaine that you can attribute to Mr. Lubrano in this courtroom is cocaine that Mr. Finn gave you?

A That's correct.

Q On August 20 you say you searched Mr. Finn in his car, right?

A That's correct.

Q Before he went in to do his work?

A That's correct.

Q What kind of a search did you give Mr. Finn?

A You have him empty his pockets, you pat him down --

Q I'm sorry, would you repeat the first part?

A Empty nis pockets, you pat him down.

Q Do you empty his pockets or do you ask him?

A You ask him to empty his pockets, he turns them inside out.

Q Each pocket?

A Each pocket.

Q What else?

A You search him.

Q What else do you do to search him? What kind of a search is this?

A It is a fairly thorough search.

Q Let's hear how thorough it is.

A It's thorough enough that you are convinced that you know everything he has on his person.

A You are convinced?

A That's correct.

Q Agent, speaking frankly, you considered Mr. Finn sort of a friend, didn't you?

A That's correct.

Q So how much of a search did it take to convince you that he was clean?

A Quite a thorough search.

Q Did you take his shoes off?

A No, sir, I did not take his shoes off.

Q Did you take his socks off?

A Not his socks off, no, sir.

Q Did you take his belt off?

A His belt, no, sir.

Q Did you ever look in the sleeves of his coat to see if he has any little bags suspended by threads?

A Yes, sir. I pat him down thoroughly, yes, sir.

Q Pat him down?

A Yes, sir.

Q Did you ever look in his crotch?

A No, sir.

Q Where did he carry his transmitter?

A Around his waist.

Q Concealed?

A That's correct.

Q In a manner that if a person gave him a casual frisk that it would be unlikely to be detected?

A I'd say it would be likely to be detected, yes.

Q Likely?

A That's correct.

Q Concealed in such a way that it would be likely to

be detected if someone gave him a casual pat down?

A That's correct.

Q Did you ever remove his shirt when you searched him?

A He would have to remove his shirt and drop his pants in order to put the transmitter on.

Q I'm talking about the search.

A That's what I'm saying. His shirt would be partially removed in the process of putting on the transmitter.

Q You weren't searching him when you were putting on the transmitter, were you?

A You searched him during and during the time you put the transmitter on, yes.

Q You searched this person that you characterized as a friend well enough so that you are satisfied he is clean, right?

A Myself, and in most instances -- I say in all instances, another agent.

Q How about his automobile?

A His automobile was also searched.

Q Would it ever be possible for that automobile to have contained either of the two exhibits which trace themselves to August 20 and October 4 without being found?

A Possible, but not probably.

Q Not probable?

A No, sir.

Q You didn't take out the spare tire, did you?

A No, sir.

Q You didn't. So it could have been in the spare tire, couldn't it?

A If it had, he would have never gotten it, because he was under my surveillance the entire time.

Q All the time?

A The car was, yes.

Q You are supposed to keep him under surveillance, right?

A That's correct.

Q That was your job, to keep him under surveillance, right?

A That's correct.

Q If I were to ask you if you ever lost track of it or weren't able to perform your job in keeping your surveillance, you'd tell me that wasn't correct and you did in fact have him under surveillance; is that correct?

A No, sir, if I didn't, I'd tell you I didn't.

Q Okay. Did you?

A No, sir, I had him under surveillance the entire time, his car.

Q You didn't look under the floor mats, did you?

A No, sir.

Q Did you remove the ashtray and look behind or under the ashtray?

A No, sir, not that I recall.

Q I assume you got down on your hands and knees and looked under the dashboard; is that correct?

A That's correct.

Q And you looked behind the crack in the seat; is that correct?

A That's right.

Q You didn't look to see if there were any well-hidden compartments?

A I didn't note any, no, sir.

Q You didn't note any and you didn't expect any, right?

A I didn't note any. I searched the automobile and to the best of my recollection I was convinced that there was nothing in the car. That is my testimony.

Q You trusted this man, didn't you?

A No, sir, I did not.

Q You didn't trust this man Mr. Finn?

A Not entirely, no, sir.

Q Was there a reason for that?

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A Just the fact that I had certain guidelines to follow that don't allow me to trust anyone in a transaction of this nature.

Q I didn't ask you if you took him for granted. I asked you if you trusted him.

A Again, my answer would be not entirely.

Q You had your doubts about him?

A I didn't trust him entirely.

Q Would you say during the period of time you dealt with him that your state of mind was that you had a reasonable doubt about his integrity?

MR. TIMBERS: Objection, your Honor.

THE COURT: The witness has testified that he didn't trust him entirely. Are you asking him to tell us in what respect he didn't trust him entirely? Because the other question which you now have to him calls for a conclusion as to whether he had a reasonable doubt. That calls for a conclusion on the part of the witness. You can ask him in what respect he didn't trust him.

MR. HOCHHEISER: Thank you, your Honor.

BY MR. HOCHHEISER:

Q In what respect didn't you trust this man?

A Mr. Finn never gave me any reason to doubt his intelligence. It's just that I was always on guard as to the

possibility that maybe his integrity might be questionable.

Q You were aware of his background; is that correct?

A That's correct.

Q Would you say that that to some extent put you on alert?

A Possibly, yes.

Q And you were aware of the fact that he was doing this for money; isn't that right?

A I couldn't say as to what his motivation was. He was paid some money for his services, yes.

Q Let's talk about that.

You say you don't know what his motivation was, right?

A That's correct.

Q As a matter of fact, wouldn't it be fair to say that there were times when he pressed you for money?

A Pressed me for money?

Q Pressed for money.

A No, sir, not me. I don't know what you mean by "pressed".

Q I see. Did he ask for money?

A On occasion he would ask for money, yes.

Q And you'd give it to him?

A Not in every instance, no.

* * *

having trouble with it, your Honor, and I don't think the jury was either. But I will make it plainer, if I can.

BY MR. HOCHHEISER:

Q Mr. Peterson, in the bar, this man Finn you say was in a bar that my client entered; is that right?

A That's correct.

Q And you know and according to your reports, that Mr. Finn spoke to another individual in that bar; right?

A That's correct.

Q And I'm asking you, isn't it a fact that you can't say that Mr. Finn received nothing from that third man --

MR. TIMBERS: Objection, your Honor. That is impossibly vague for the witness to answer.

THE COURT: The witness can answer.

A I can't say that he received nothing, you are right. I can't say that.

Q Right.

And the reason that you ascribe to your conclusion about where he got the cocaine when he came out of the luncheonette was the bulge in his pocket; is that right?

A That's correct.

Q You don't know if that bulge in his pocket was --

THE COURT: Who's his, now?

Q Mr. Finn's pocket. You don't know if Mr. Finn took

that package from behind the belt buckle and put it in his pocket, do you?

A I don't know that, no, sir.

Q But you don't know that because you didn't search him after he left the bar, did you?

A After he left the bar, no, sir.

Q You don't know what happened in that bar, do you?

A I personally was not in the bar.

Q And there were a lot of people in the bar?

A There were agents in the bar as well as other people; that's correct.

Q Let's make one thing perfectly clear, just so that there is no problem with it.

You never heard from any agent that they saw Mr. Lubrano give anything to this Finn in that bar, did you?

A I personally have not heard that, no, sir.

Q How long did they spend in the bar?

A In the bar?

Q Yes.

A Just a few minutes.

Q And they went into the luncheonette; is that correct?

A That's right.

Q You never heard any agent say or report that he saw

Mr. Lubrano give this Finn anything in that luncheonette, did you?

A No, sir, I haven't heard any agent say that they saw that, no, sir.

Q Then you say you saw Mr. Finn come out and you observed a bluge in his pocket; is that right?

A That's correct.

Q Where were you and where was he?

A He was coming out of the Gaiety East Luncheonette and he was standing across the street on the street.

Q Across the street, across Lexington Avenue?

A Across Lexington Avenue.

Q At what time of day?

A Again, I can not be specific. Late afternoon.

Q Weekday or weekend?

A I do not recall.

Q Was there considerable vehicular traffic?

A I don't recall the traffic being any problem, no.

Q Pedestrian traffic?

A I don't recall as to how much pedestrian traffic there was either.

Q But at any rate, from across Lexington Avenue you saw this bulge in the pocket, is that right?

is that right?

A That's correct.

Q Then we come to October 4. Again you didn't see Mr. Lubrano handle, touch or have anything to do with any cocaine; is that right?

Q I didn't see him handle or touch any, no, sir.

Q And the cocaine that you get that you introduced into evidence here you got from Mr. Finn; isn't that right?

A That's correct.

Q Your observations consisted of seeing Mr. Finn and Mr. Lubrano go into a building, is that right?

A That's correct.

Q And they didn't go in that building together, did they?

A No, sir, they did not.

Q They went in that building separately, didn't they?

A That's correct.

Q What kind of a building was this? Is this a pup tent, a one-family house, a house trailer -- what is this building?

A It's an apartment building.

Q How big?

A I don't know how big. It has at least eleven

stories.

Q Did you see where they went in this building? Did you see where each of them went?

A I did not see, no, sir.

Q You didn't even see where Mr. Finn went, did you?

A No, sir, I did not.

Q Did any agent ever report to you that they saw where each of these people went?

A It was not reported to me, no, sir.

Q Did you ever check the list of tenants in that building? Is that a residential building, by the way?

A Yes, sir, it is.

Q Did you ever check the list of tenants in the course of your investigation?

A Yes, sir, I did.

Q Mr. Lubrano was not one of those lists of tenants, was he?

A He was not listed, no, sir.

Q And Mr. Finn came out of that buidling, gave you some cocaine and received generally some part of approximately $5,000, isn't that right?

A Some part, that's correct.

Q And you had told him to buy this cocaine from Mr. Lubrano, didn't you?

A That's correct.

Q How carefully did you search him, if you searched him, after he came out of that b lding?

A He went into a stairway, he gave me the package, he removed his pants, took off the Kell --

Q Removed his pants, sir?

A Not removed them, took them down. Took off the Kell, I patted him down and that was -- he turned his pockets out. That was the extent of the search.

Q Turned all his pockets out?

A That's correct.

Q Why?

A Because that is the normal procedure.

Q You wanted to see if there was none of that money left?

A That's correct.

Q Did you look in his shoes?

A No, sir, I did not.

Q Did you look in his socks?

A No, sir.

Q Where was this doorway or hallway?

A It was on -- as I recall, it was on I believe 58th Street just east of Lexington Avenue. It's an entrance into a garage, as I recall.

* * *

* * *

asked several questions about money that was paid to Tony Finn. I believe you testified that he received in the vicinity of $5,000 for his services during the period of time he was working with the Drug Enforcement Administration.

Was all of that money received for his services in connection with this case?

A No, sir, not this case.

Q How much money of that money was for his services in connection with this case?

A I wouldn't be able to say exactly.

Q Mr. Hochheiser, Mr. Lubrano's attorney, asked you yesterday whether any agent told you that Lubrano had give Finn drugs in the Gaiety East Restaurant, and your answer was no --

MR. HOCHHEISER: Objection. That wasn't the question. I asked him if any agent told him that he had seen him give drugs or observe him give drugs to Finn.

MR. TIMBERS: I am sorry.

A And your answer to that was no.

My question is: Did anybody tell you that Lubrano had given Finn drugs in the Gaiety East Restaurant?

MR. GRABER: Objection, your Honor.

MR. TIMBERS: Your Honor, I believe --

THE COURT: Approach the bench.

(At the side bar.)

THE COURT: Read the record back.

(Record Read.)

MR. GRABER: Your Honor, that objection is based on the following:

It is apparent from the question that Mr. Timbers was trying to elicit from the witness that Mr. Finn told him. Mr. Hochheiser did not refer to Mr. Finn, he referred to any agent, and I would say, your Honor, that no door has been opened here and that what Mr. Timbers is attempting to do now is put in total and complete hearsay by Mr. Finn before this jury, and it's just that, complete hearsay.

THE COURT: That's why I had the reporter read the record, to get clear what question was asked of this witness by Mr. Hochheiser.

MR. HOCHHEISER: Yes. What I asked the witness was whether the surveilling agents had seen any drugs passed from Finn to this witness. I naturally assume that Finn would have told the agents that he got it from Lubrano, or Lubrano wouldn't be here.

But that doesn't mean that I would wish to have this hearsay statement by Finn, whose credibility I don't trust, come into this record. I can't cross-examine Finn.

It was the other agents, not their knowledge,

but their observations that I was asking about.

THE COURT: Just a minute. I thought the question which you said that you put to the witness was whether any other agent told him -- that's not correct?

MR. HOCHHEISER: No. I asked him whether any other agent told him that he had observed this transaction from Finn to Lubrano.

THE COURT: The instant transaction.

MR. TIMBERS: The Gaiety East.

MR. HOCHHEISER: The Gaiety East transaction.

THE COURT: Which date was that?

MR. TIMBERS: August 20th.

MR. HOCHHEISER: In other words, what I am suggesting is that the answers to my questions reveal that no agents ever saw Lubrano give this stuff to Finn. I don't contest that Finn probably told the agents that he got it from Lubrano, but at the same time naturally that is inadmissible.

THE COURT: What do you have to say, Mr. Timbers?

MR. TIMBERS: Your Honor, I believe that Mr. Hochheiser has opened up the subject of the basis for Mr. Peterson's knowledge about what happened in the Gaiety East Restaurant on August 20.

THE COURT: Did other agents observe the transaction

in the Gaiety East?

MR. TIMBERS: No agent was inside the Gaiety East. The only basis he has for the information -- the only basis he has for what happened inside the Gaiety East is what Finn told Peterson.

MR. HOCHHEISER: That's clearly inadmissible, your Honor. That would be reversible error.

MR. TIMBERS: I don't think, now that you have opened up the basis for Peterson's knowledge --

THE COURT: What I am trying to get clear is whether Mr. Hochheiser's question was limited to observation of other agents or whether he asked the witness about a conversation with other agents.

MR. TIMBERS: I think the gist of his question is what information was conveyed to Agent Peterson. He did ask it in terms of did the agents say they had observed a transaction.

MR. HOCHHEISER: Thank you.

MR. TIMBERS: That's correct?

MR. HOCHHEISER: That's right.

MR. TIMBERS: But I think the gist of the question is how, what information does Peterson have, and I think that I am entitled to similarly ask him, and I don't intend to go any further from this, do you have any information about

what happened in the Gaiety East Restaurant, who gave you that information.

THE COURT: He's already testified to that, hasn't he?

MR. TIMBERS: I don't think he has said that Finn told him what happened. I don't think he has testified that Finn told him.

MR. HOCHHEISER: Of course he hasn't --

THE COURT: Just a minute.

MR. HOCHHEISER: He hasn't testified to that because it's been inadmissible throughout this trial. You can't say to me that I opened up the door because I'm making inquiry of what was observed by competent witnesses who are here to testify in court.

You indicted this man, you brought him to trial. Of course that is an issue.

MR. TIMBERS: Of course you have raised a question

THE COURT: Just a minute. With respect to the Gaiety East on August 20th, we have the testimony of Peterson as to what he said to Finn?

MR. TIMBERS: No. So far the only testimony that the Government has, there will be more later on, but the only testimony the Government has now is that Agent Peterson saw Finn and Lubrano go into the Gaiety East Restaurant and

several minutes later he saw them come out, I believe separately, with Lubrano -- I'm sorry -- Finn having a bulge in his pants pocket, and later on received --

MR. GRABER: That's the luncheonette, not the bar.

MR. TIMBERS: We are talking about the luncheonette, I'm sorry. And then Mr. Hochheiser asked Agent Peterson, raised the issue of Agent Peterson's knowledge about what happened there --

MR. HOCHHEISER: I didn't raise the issue.

MR. TIMBERS: By asking what happened inside it himself, then asking about what other agents told him they observed. I think I am entitled to ask whether anybody else told Agent Peterson what happened inside the restaurant.

MR. HOCHHEISER: If Agent Peterson can testify to what Finn told him then I can bring in Finn's criminal record, his character, his background and everything else, but Finn will be testifying here in effect.

MR. GEOLY: Your Honor, I object to it. There was never a more clear instance of hearsay asking what somebody else told him.

MR. TIMBERS: I don't dispute that normally it is hearsay, but I think Mr. Hochheiser opened up the question.

THE COURT: Do you have other agents who are going to testify about that August 20 transaction?

MR. TIMBERS: Nobody will testify about what happened in the restaurant. There was no surveillance in the restaurant.

THE COURT: Has this witness testified that he received that package?

MR. TIMBERS: Yes.

THE COURT: From Finn. It's implied in that, isn't it, that Finn told him where he got it?

MR. TIMBERS: I think it is implied in the testimony we have had already and for that reason I don't think it's terribly damaging to simply --

THE COURT: Pardon me?

MR. TIMBERS: It is implied in the testimony we have had already and therefore I don't think what I am proposing to ask is terribly damaging because I think the jury can draw the conclusion that Finn said he got it from Lubrano, since they sent Finn out on another deal with Lubrano two months later.

MR. HOCHHEISER: You know -- well, I wouldn't say it. I can't imagine how you say it won't be damaging. This jury can only consider competent evidence in the record. They can not assume that Finn told this agent that Lubrano gave him that stuff and they can't assume it and it would be reversible error to allow this man to say that some absent

person told him something which would involve my client, which would inculpate my client. The fact is with regard to the other question, Judge, they don't have any competent evidence against Philip Lubraono in these transactions, period. And he seeks to have this man on the stand testify to what somebody else told him. Clear, rank hearsay.

I didn't open up any subject except what agents observed, and I was very careful about that question. What they observed. Because that is competent evidence.

THE COURT: Your question then to Mr. Peterson was: Did any agent tell you that he observed in the bar -- the Gaiety East, a transaction between Lubrano and Finn; is that it?

MR. HOCHHEISER: Whether he or other agents observed any transaction between Finn and Lubrano, right. Did they see Lubrano give Finn any drugs. I specifically limited my question very intentionally.

THE COURT: In other words, you didn't put it the way I just put it?

MR. HOCHHEISER: As I understood your question, did I ask this agent if he observed --

THE COURT: No, did any agent tell him that he observed.

MR. HOCHHEISER: Right. I was limiting it to what

agents had observed, that's right. But not, did Mr. Finn tell him that Lubrano gave it to him when nobody made an observation.

All these people can be called to the stand. These people will be testifying here.

THE COURT: What people; the agents?

MR. HOCHHEISER: Agent Smith and the people who observed. I am concerned with observations by reliable people like agents of the DEA, people who can be cross-examined and give evidence. What Finn told this man is inadmissible.

MR. TIMBERS: Your Honor, just on that point, I don't know how Mr. Hochheiser can represent that these people can be called to the stand. He doesn't know which agents Agent Peterson talked to. As far as the hearsay quality of the testimony that he asked about, it stands in exactly the same position as the testimony of Finn is.

THE COURT: No, because he could call them as his own witnesses.

MR. TIMBERS: There has been no testimony that those agents are still alive, that they are still in New York, that --

MR. GRABER: Are you representing that they are not available?

THE COURT: Just a minute. I think this, Mr. Timbers. If you agree that Mr. Hochheiser carefully limited his question to whether any agent or this witness observed the transaction, then you can't bring in Finn's hearsay.

MR. TIMBERS: I would just say that that leaves the Government in the rather preposterous situation of having a witness who testifies that he observed nothing in the bar between Lubrano and Finn, nobody told him about anything in the bar between Lubrano and Finn, and still he went out and -- still this agent sent Finn out on October 4th to buy drugs from Lubrano.

THE COURT: Wait a minute. I thought we were talking about August 20th.

MR. TIMBERS: Right. But what I am saying is what Mr. Hochheiser has done is to make it appear as thought the Government is acting capriciously against Lubrano because he has brought in all the hearsay testimony about people who did not observe anything in the bar, and then leaves himself the opening to argue that nobody observed anything in the bar I'm sorry, in the luncheonette on October 20th between Finn and Lubrano.

But here the Government is going out again on October 4th, still trying to sell to Lubrano.

MR. HOCHHEISER: I'm not trying to put the Govern-

ment in any capricious situation. I am trying to distill and make plain the competent evidence in this case. I'm not putting the Government in a capricious situation. The Government is in a difficult situation because the key witness here against Lubrano who would be competent to give this evidence is not available.

There is no exception to the hearsay rule unless it's a dying declaration or an act against personal interest. The Government's position is difficult with regard to Lubrano, but it's not my doing and what I am trying to do is distill the competent evidence so at least I can get up and explain to the jury what the competent evidence is and what it is not.

Of course that doesn't give Mr. Timbers the right to bring in hearsay evidence. That is the difficultly with the Government's case. It's based on lack of competent evidence.

THE COURT: When you give this argument to the jury, as Mr. Timbers has just pointed out, what you are going to argue is that no agent told Mr. Peterson that he observed a transaction between Lubrano and Finn in the bar and you are going to base that on your question to the agent -- to the witness, rather, Mr. Witness. That is Mr. Peterson.

You are going to say to the jury, remember, I asked

Mr. Peterson whether any other agent told him --

MR. GEOLY: It's a question of whether any other agent saw it.

THE COURT: How would Mr. Peterson know what another agent had seen except by having that agent tell him?

MR. HOCHHEISER: Judge, that is a different level of hearsay. There was no objection to that presumably because Mr. Timbers knew that if he objected to it I would simply call the other agents, which I will to get out that evidence. They are all agents, and they are duty bound, etcetera, in this case, that I didn't have any objection to that level of hearsay in the official course of business, one agent telling another or reporting what he saw, and Mr. Timbers, since they are agents, he didn't object because he knows that's the truth and --

MR. TIMBERS: I objected because --

MR. HOCHHEISER: Please let me finish. That is a different level of hearsay.

THE COURT: I don't know what you mean by level of hearsay.

MR. HOCHHEISER: I know you don't, Judge.

I am talking about observations by agents of the federal government of whether Mr. Lubrano gave this man Finn anything. I'm not talking about what Mr. Finn told

somebody not under oath and not subject to cross-examination. I am probably better off with this in the record if it comes in because I'm absolutely convinced that it's reversible error. It is rank hearsay and it is the most prejudicial kind of rank hearsay. There is no way that it can be overlooked. To do that changes the whole complex of the case, to just have Mr. Finn testify through an agent;

Let him tell what Mr. Finn told the agent.

MR. TIMBERS: I just put it in where you opened it up. I'm not going to get into it except to the extent it's necessary to have Peterson's state of mind when he sent Finn out on October 4th.

MR. HOCHHEISER: I'm not arguing the motive. I'm talking about what competent evidence there is of Lubrano's guilt. I'm not suggesting that the agents picked Lubrano out, that's obvious, that they picked him out and they were going to cause him some sort of grief. I'm not suggesting that at all.

I never even thought of that. I'm just trying to show and distill what the competent evidence is here, what people of the DEA saw, what they observed. And I think --

THE COURT: Let me say this, Mr. Hochheiser. There is as the record now stands, there is the hearsay testimony of these other agents.

MR. HOCHHEISER: Without objection, Judge. And I assume that he didn't object because they are his agents, he know that the statement is true, and he knows that I can call them as my own witnesses.

I object to the hearsay testimony of this man Finn, which is on quite a different footing. And I don't see how it can be overlooked.

MR. TIMBERS: Mr. Hochheiser has misstated my reasons for objecting.

MR. GOELY: Your Honor, may I --

THE COURT: You can't talk when Mr. Hochheiser is talking.

MR. GRABER: Judge, it's my objection.

THE COURT: We can't have everybody talking at once.

MR. TIMBERS: I just want to make clear for the record that Mr. Hochheiser misstated my grounds for not objecting.

I did not object because I knew he was opening up this area and it seemed to me if I opened up the area he was leaving me an opening to at least determine what the basis for Agent Peterson's state of mind was on October 4th when he sent Finn out the second time.

THE COURT: The objection to the question is

sustained.

MR. HOCHHEISER: Thank you.

(In open court.)

BY MR. TIMBERS:

Q Mr. Peterson, moving on, Mr. Hochheiser, on behalf of Mr. Lubrano, also asked you yesterday whether it wasn't true that the only cocaine that you attribute to Lubrano was the cocaine that you received from finn, and you answered yes, the only cocaine that you could attribute to Lubrano was the cocaine that you received from Finn.

Do you recall that question and answer?

A Yes, I did recall the question, yes, sir.

Q My question is: Which items of evidence, which items of cocaine that you received from Mr. Finn do you attribute to Mr. Lubrano?

MR. HOCHHEISER: I would object to the phrasing of the question; does he attribute to Mr. Lubrano.

We are getting into the area of opinion.

MR. TIMBERS: I am simply repeating Mr. Hochheiser's question from yesterday. I have it down in my notes and I'm sure if the reporter reads it back it will contain the word attribute also.

MR. HOCHHEISER: I'm sure your Honor realizing the inartful form of that question, that I changed it. If

my memory served me correctly, to the cocaine with which Mr. Lubrano is charged.

THE COURT: Do you have that portion of the record here?

THE REPORTER: No, your Honor. It's in my office. It's from yesterday.

MR. HOCHHEISER: If Mr. Timbers is suggesting that now the agent can speculate or give opinions, I certainly didn't anticipate that. I don't see any legal basis for that.

THE COURT: What do you say your question to the witness was?

MR. HOCHHEISER: My recollection was, your Honor, that I started to ask the witness in terms of in order to characterize or describe the two items of evidence, the numbers of which I didn't remember, from August 20 and October 4th. I referred to them as items that the agent attributed to Lubrano. My recollection is that realizing that that was an inartful form that called for his own conclusion, my recollection is that I rephrased it and couched it in language directed to the items with which Mr. Lubrano was charged or which the Government claims was Mr. Lubrano's.

I believe that is the way the record stands, although I haven't read it.

THE COURT: Do you accept that version?

MR. TIMBERS: Your Honor, I have a recollection of that. My notes show attribute. If we want to check the reporter's notes, perhaps we could do that at a break and bring Mr. Peterson back after that.

I would suggest though that even on Mr. Hochheiser's alternate phrasing --

THE COURT: That's what I am asking you. Do you accept his alternate phrasing?

MR. TIMBERS: No, I think it was attribute. But I would suggest that even on Mr. Hochheiser's alternate phrasing, items that the Government claims came from Mr. Lubrano, I believe that word permits this question also.

THE COURT: That word was?

MR. TIMBERS: Mr. Hochheiser's question was which items, that -- as I understand it, Mr. Hochheiser's question was which items of the cocaine that the Government claims come from Mr. Lubrano did you received from Mr. Finn. And if that was the way Mr. Hochheiser phrased the question, my question to Mr. Peterson is, which of the items of cocaine in this case do you claim came from Mr. Lubrano.

THE COURT: That was what I was trying to ask you.

MR. HOCHHEISER: I see what he is getting at. Concededly the charges in this case being a conspiracy charge,

charge Mr. Lubrano with being a conspirator --

MR. TIMBERS: I'm not getting at the conspiracy.

MR. HOCHHEISER: Then I can not understand how he is going to ask this agent what he attributes. How is the jury to evaluate that, what he attributes? We are talking about evidence.

THE COURT: We are talking about the question which you put, aren't we?

MR. TIMBERS: Yes, I'm picking up Mr. Hochheiser's words exactly.

MR. HOCHHEISER: Your Honor, that is a perversion of the question.

THE COURT: Maybe we should let the reporter get the record and straighten this out now.

MR. HOCHHEISER: Could we approach the side bar and find out where Mr. Timbers wants to go and maybe we can agree?

Perhaps the question he wants to ask isn't something I should be concerned about.

THE COURT: Will you go get the record, Mr. Reporter?

(Pause.)

(At the side bar.)

MR. TIMBERS: Would you put the question, Mr.

Reporter?

MR. HOCHHEISER: Could I ask, your Honor, that he read the previous questions so we understand the context?

THE COURT: Yes.

(Record read.)

MR. TIMBERS: That's the basis for my question.

MR. HOCHHEISER: What I am showing there is that the only physical evidence here comes through Finn. That's obvious.

THE COURT: He can now ask him what exhibit he attributes to --

MR. HOCHHEISER: That is what I thought his question was. I could have saved all this time. I assume that --

MR. GEOLY: Don't give him any questions.

MR. HOCHHEISER: I assume he was going to ask him if in fact doesn't he attribute --

MR. TIMBERS: Perhaps I should make an offer of this on this. The gist of this is that the May 10th cocaine comes from Lubrano, and there is competent testimony that will come in later on to show that it comes from Lubrano. I expect that the agent will testify that of the four exhibits we have, three of them came from Lubrano, perhaps the fourth.

I haven't talked to the agent about this, because

the other one was a sample, May 1st was a sample of what was going to be sold on May 10th.

In any case, May 10th came from Lubrano and I expect that the agent will testify and perhaps give his reasons for so testifying that the May 10th cocaine came from Lubrano.

MR. HOCHHEISER: But your Honor, what I am trying to do is, as I say, distill and segregate the competent evidence from each witness. He's not the competent witness to attribute the May 10th sale to Lubrano. That has to be done by a competent witness.

THE COURT: All right. But let's get back to where we were.

You want to ask the agent now which of the three exhibits --

MR. TIMBERS: Which of the four exhibits.

THE COURT: Four exhibits he attributes to the transaction on August 20th?

MR. TIMBERS: No, to the defendant Lubrano.

THE COURT: In which Lubrano was engaged, is that it?

MR. TIMBERS: Right.

MR. GRABER: What he is attempting to do, your Honor, is attribute the May 10th and 11th transaction to Mr.

Lubrano to which I must strenuously enter an objection in this regard also.

MR. GEOLY: There has been no proof of that.

MR. GRABER: There has been no proof of that and what he's attempting to do now is to implicate all three defendants into a conspiracy involving, in other words, trying to connect all three defendants together with all the transactions, to which so far there has been no evidence connecting all three defendants to all the transactions so far described. And what he's now attempting to do is to make the connection through what is obviously rank hearsay, and I find that highly prejucidial to Mr. Vitale and I must strenuously object to this offer.

THE COURT: I understood Mr. Timbers to say he had other witnesses who could testify.

MR. TIMBERS: Right.

MR. HOCHHEISER: I can't object to that.

THE COURT: The question we are on now is a question put to this witness at the time of cross-examination by Mr. Hochheiser, which we have just read, to the effect of what cocaine the witness attributes to Lubrano, is that it?

MR. TIMBERS: No, I think the effect of the question was: Did all the cocaine that you, Mr. Witness, attribute to Lubrano come to you through Finn, and my question

then following that up is which cocaine do you attribute to Lubrano.

THE COURT: As in understood the question read by the reporter, and I will have him read it again if necessary, is a question by Mr. Lubrano which said with regard to the August 20 transaction what cocaine do you attribute to Mr. Lubrano. You say that's not right.

MR. TIMBERS: Perhaps we should have the reporter read the question back.

MR. HOCHCHEISER: In context with the other previous question so you can see the thrust of what I did.

THE COURT: All right.

(Record read.)

THE COURT: Now the question to the witness is:

What cocaine do you attribute to Mr. Lubrano; is that it?

MR. TIMBERS: Yes, cocaine in the courtroom.

THE COURT: All right.

MR. HOCHHEISER: You say the objection is over-ruled?

THE COURT: No, the question which he is going to be permitted to now put to this witness is:

What cocaine do you, Mr. Witness, attribute to Mr. Lubrano?

MR. HOCHHEISER: Your Honor, it was clear, just for the record, it was clear that when I asked him what evidence he attributes to Mr. Lubrano, I went through all the various competent methods that he might have to present evidence, whether he searched Mr. Lubrano, whether he searched Mr. Lubrano's house, etcetera, etcetera, and I ended up the thrust of it was the evidence that he attributes to Lubrano, that he attributes to Lubrano as a competent witness in connection with his testimony, is the stuff that Finn gave him.

If Mr. Timbers wants to attribute other evidence to Mr. Lubrano, that's up to another competent witness to do that. But every time I use a word in the English language does not,as Mr. Timbers proffers, open up doors to use this word out of context and go from the thrust of my questioning, and I wholly object to it.

THE COURT: What was the thrust of your questioning?

MR. HOCHHEISER: That this witness, the only evidence that he can introduce to the jury, competent evidence, are the two items that he got from Mr. Finn.

He didn't find anything on him in searching him or anything like that. He didn't conduct a search of his place of business or his home. Those questions are all in there

and in the same area they all precede this. That is the topic of it only. The only evidence he attributes to Finn, the only evidence he attributes to Lubrano, the only evidence introduced on the two sales charged against Lubrano are the two items that he got through Finn. That's all I was saying.

HTE COURT: Is there anything else? I don't understand this.

MR. TIMBERS: Yes, there is, the May 10th cocaine was supplied by Lubrano to Vitale and it may be that the sample was provided by Lubrano also, the May 1st sample.

THE COURT: But you are going to bring that in through some other witness?

MR. TIMBERS: Yes.

THE COURT: So we will limit to that.

MR. TIMBERS: I will simply ask him which items of cocaine that are exhibited do you attribute to Mr. Lubrano.

MR. GRABER: Judge, he's trying to establish a connection of two straight transactions through hearsay.

THE COURT: Yes. As to that first one, the May 10th, is that right? Is that the sample, May 10th?

MR. TIMBERS: The sequence is May 1st, Vitale gives a sample to Finn. May 10th a larger amount of cocaine is placed in the trunk of the car. The answer I expect the agent to give is that he attributes the May 10th cocaine to Lubrano

because, well, there will be subsequent testimony that other agents saw Vitale go into Lubrano's store at the time he was picking up the cocaine, and I intend to find out from this agent, following Mr. Hochheiser's line of questioning, which of these items of evidence does Agent Peterson attribute to Mr. Lubrano.

I suspect he will say October 4th, August 20th, May 10th; perhaps May 1st.

MR. HOCHHEISER: Judge, I can't object to a competent witness who he says he is going to call attributing it to him, but he can't ask him that. This is as perverse as if the man offered a pistol against Lubrano, a policeman offers a pistol and I say to the policeman, you searched this man and this is the pistol that you attribute to Lubrano, and the prosecutor would say, "Well now, I want him to say that in his own mind through hearsay evidence he attributes a lot of crimes, a lot of pistols, a lot of murders;"that's not the same.

I expect the next agent to come in and attribute in some manner the May 10th evidence to Lubrano, but that is going to be a competent witness who can testify what he saw. He can't do it through this witness, that's unfair.

MR. TIMBERS: I agree that normally the state of mind of an agent is to which drug transaction the defendant

is responible for is a matter that is not for the witness to answer because it's not competent testimony.

However, I think that the series of questions that were read back and the whole context of it as Mr. Hochheiser insisted upon, shows that Mr. Hochheiser is probing into the state of Agent Peterson's mind about these transactions, and simply following up his line of questioning I'd like to ask the agent which of these exhibits Agent Peterson attributes to Lubrano.

MR. HOCHHEISER: It's quite the opposite, your Honor.

I never tried to get his state of mind in these areas. I am trying to limit for the record, I am trying to distill exactly what his competent observations are. See how the questions go: Did you ever search him and find it yourself, did you ever search his place of business and find it, did you ever follow him and see him deal with other people?

The only evidence that you can testify to in this case is these two items that you say came through Finn. If another agent can connect him to May 10th, Fine, I understand that, I can't object to it. But he can't say, well, this is my state of mind, this is what I think of the man. That's outrageous.

THE COURT: Just a minute. There is something that I don't understand here.

In each instance when we had cocaine moving from one person to the other, that cocaine, whether a sample or a buy, was something given to Finn, was it not?

MR. TIMBERS: Right, because Finn was the only customer.

MR. HOCHHEISER: He didn't see the May 10th transaction concerning Finn. That is what I am saying. He is the wrong witness. He can not testify what he believes, because some other potential witness may have told him that. He can't testify to it. He is not a competent witness, and Mr. Timbers recognizes that he's not ordinarily a competent witness, but he has come with some sort of perverse logic to try to make him an exception to the rule. There is no such exception to the rule. The man can't tell the jury what he things. He can only tell the jury what he saw.

THE COURT: What do you take the word"attribute" to mean?

MR. HOCHHEISER: In the context in which I used it, when I used the word"attribute," when I described this evidence, the August 20th and October 4th cocaine, in order to indicate what I was talking about because that's all I examined the officer about. I didn't know the numbers. I

said that is the cocaine that you attribute to Lubrano, and I showed that he had no personal observations of Lubrano with cocaine. That was the point of it. No searches and seizures; no tailing and observations of him dealing with others. Only these two items that he saw go through Finn. But I can't --

THE COURT: He didn't see it go through Finn.

MR. HOCHHEISER: Well, Finn gave him these items after being in a position where he could have gotten them from Lubrano. That's the tenor of the proof. What I was saying, in other words, he had no personal observations beyond what he testified to as to the August and October transactions.

I didn't ask him what he believed. I know what he believes. He believes they are all guilty of all these things. Naturally I wouldn't ask him a question like that. That would be absurd.

MR. TIMBERS: I believe the record will show that question, the preceding several questions Mr. Hochheiser asked to have read all dealt with the state of mind of Mr. Peterson.

MR. HOCHHEISER: No, Judge. They deal with his observations. If you have them read back you will see they all dealt with what he personally observed. That is the point of these questions.

THE COURT: You are also making the point that all he knew about the cocaine which he received came from Finn, and Finn's statement to him that he got it from Lubrano or whoever, isn't that right?

MR. HOCHHEISER: It's just that all the cocaine that he introduced against Lubrano came from Finn. There is no way that my questions permit anybody to ask him what his state of mind is about Lubrano.

Who cares about his state of mind? I know what his state of mind is. They all think they are all guilty. I asked him about the facts. I asked him whether he searched his place of business, whether he tailed him and followed him. Whether he made observations. That is what I am talking about.

Mr. Timbers has seized upon a word, attribute, that I used in order to identify the two items --

THE COURT: No, I think your point was to show that Finn was a person who could not be trusted.

MR. HOCHHEISER: Right.

THE COURT: You went into his character without objection from the Government.

MR. HOCHHEISER: That's right, Judge. So?

THE COURT: What you were trying to show is that Finn could have said anything to this man.

MR. HOCHHEISER: That's right.

THE COURT: So the Government can now pursue that and ask this agent what Finn told him about any drug transaction with Lubrano.

MR. GEOLY: Judge, I am going to ask for a severance immediately. I never heard of a ruling like that.

MR. HOCHHEISER: I'm going to ask for a mistrial. This isn't what he's asking for. He's asking for this witness to testify not what Finn told him, he's asking for this witness to testify that another agent told him that he observed in connection with the May 10th sale, that he observed Finn went to Lubrano's jewelry shop sometime during this transaction. He's asking him to testify what another agent told him he observed on May 10th and he's not the competent witness for that.

THE COURT: I think we have argued this and reargued this, and the Court is going to rule that in view of Mr. Hochheiser's question to this witness yesterday which going as follows:

What narcotics or what cocaine do you attribute to Lubrano, the Government is permitted to ask the same question of this witness.

MR. GEOLY: I move for a mistrial on behalf of Rizzo and I ask for a severance.

THE COURT: That's denied.

MR. GRABER: I join in the motion.

MR. HOCHHEISER: I move for a mistrial.

THE COURT: Denied.

(In open court.)

BY MR. TIMBERS:

Q Agent Peterson, what cocaine that has been introduced into evidence during this trial do you attribute to the defendant Lubrano?

A As I understand that question, I attribute the cocaine that we received from the rental car --

Q To make things clear, that is the May 10th transaction?

A The May 10th and 11th transaction; the August 20th transaction, and the October 4th transaction. Those three.

MR. TIMBERS: I have no further questions for this witness.

THE COURT: Anything further?

xxxx

RECROSS-EXAMINATION

BY MR. HOCHHEISER:

Q Mr. Peterson, you were just asked a question by Mr. Timbers, what cocaine that was introduced into this trial do you attribute to Mr. Lubrano. Just so the jury isn't confused, you didn't make any observations on May 10th concerning Mr.

Lubrano that you left out of your testimony, did you?

A Observations?

Q Yes.

A No, sir.

Q This conclusion of yours, or this attribution of yours concerning the May 10th cocaine transaction, that's not based on your personal observations, is it?

A If you mean personal observations did I actually see Mr. Lubrano --

Q See it, hear it, touch it; yes, did you?

A No. They are drawn from other sources.

MR. HOCHHEISER: Thank you.

THE COURT: Anything further?

MR. GRABER: I have nothing, your Honor.

MR. GEOLY: Nothing further.

MR. TIMBERS: The Government has no further questions.

THE COURT: This witness may come down.

(Witness excused.)

MR. TIMBERS: The Government calls Frank White.

F R A N C I S E. W H I T E, called as a witness by the Government, having frist been duly sworn, testified as follows:

DIRECT EXAMINATION

xxxxx

BY MR. TIMBERS:

Q Mr. White, by whom are you employed?

A By the Drug Enforcement Administration.

Q What is your position with the Drug Enforcement Administration?

A I am a group supervisor.

Q Were you so employed on May 11, 1973?

Q Yes, sir, I was.

Q Perhaps I should revise that question.

Were you so employed in May of 1973?

A Yes, sir.

Q Did you participate in the investigation of this case on May 10th, 1973?

A Yes, sir, I did.

Q Did you participate in the investigation of this case on May 11th, 1973?

A Yes, sir.

Q To save time, I am going to skip over what you did on May 10, 1973.

Will you tell the jury what you did on May 11, 1973?

A On May 11 at approximately 12:30 I established surveillance --

MR. GRABER: 12:30 a.m. or p.m., your Honor.

A 12:30 p.m. In the afternoon of May 11. I

established surveillance in the vicinity of Canal and Allen Street in New York City. At that time I observed an automobile, a rented automobile that had been parked by an agent at this vicinity. I maintained surveillance on the automobile until approximately 7 p.m. on the evening of May 11th. At 7 p.m. on May 11th I observed an Asian walk to the trunk of the rented automobile. He reached forward in this manner, opened up the trunk. The trunk went up. I couldn't observe, but he leaned inside the trunk of the automobile and he closed the trunk, and then he walked around the driver's side of the automobile, walked north on Allen Street, and he crossed from Allen Street to Canal Street. He walked north on Canal Street and then west on Canal Street, eventually to a jewelry store.

Q What was the name of that jewelry store?

A I don't recall, sir.

Q Did you observe anything in the jewelry store?

A Yes, sir. I observed the Asian enter the jewelry store and he met with an individual I had identified as Mr. Vitale.

MR. TIMBERS: I have no further questions of this witness.

THE COURT: Any cross-examination of this witness?

MR. GEOLY: I have none.

XXXX CROSS-EXAMINATION

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* * *

A At that time, no, sir.

Q No, sir, there was not, or you could not tell us?

A All I can say is that I know the Oriental was in the store and I know Mr. Vitale was in the store, because I saw them meet.

Q And Agent Peterson was in that automobile with you, is that your testimony?

A Yes, sir, I have testified to that.

MR. GRABER: Just bear with me a moment.

(Pause.)

MR. GRABER: I have no further questions, Your Honor.

THE COURT: Anything further of this witness?

Thank you, you may come down.

Next witness.

(Witness excused.)

MR. TIMBERS: The Government calls Paul Buceti.

xxxx P A U L B U C E T I, called as a witness by the Government, having first been duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. TIMBERS:

Q Mr. Buceti, by whom are you presently employed?

A The New York Drug Enforcement Task Force.

A Directing your attention to May of 1973, by whom were you employed at that time?

A The Drug Enforcement Administration.

Q What was you position with the Drug Enforcement Administration at the time?

A Special agent.

Q Directing your attention to May 10, 1973, did you participate in the investigation of the case that is now under trial?

A Yes, sir, I did.

Q Will you tell the jury what you did on that day?

A Yes, sir. On May 10th in the afternoon myself and at that time it was Agent Peterson went to the Drug Enforcement garage and Agent Peterson -- I'm sorry, I observed Agent Peterson search the undercover rental vehicle.

Q Did he find anything in it?

A No, sir.

Q Was anything else done at the garage?

A Yes, sir. Agent Peterson placed $3,500 in the trunk of that car.

Q Was that money recorded in any way?

A Yes, sir.

Q How was it recorded?

A The serial numbers of all the bills were recorded.

Q What happened after the events in the garage?

A I drove the car out of the garage and I waited at a prearranged location. Later on that afternoon I picked up an individual that I know of as Tony Finn and then at approximately 6:30 p.m. myself and Tony Finn arrived at the intersection of Canal and Allen Streets in New York City.

Q What did you do there?

A I parked the vehicle, gave Tony Finn the key to the trunk of the car, and I observed him walk south on Allen Street to Canal Street, and then he turned west on Canal Street.

Q Did you see what Tony Finn did after that?

A No, sir.

Q What happened next?

A I waited for Tony Finn to arrive. I waited for him at the intersection of Hester and Allen Streets. He came back about 7 o'clock.

Q Is Hester Street north or south of Canal Street?

A It's north.

At 7 o'clock I met Tony Finn again at that location and we were picked up by a cab driven by Agent Shea.

Q What happened after you and Tony Finn were picked up by this cab?

A Agent Shea drove us to a location in The Bronx,

and there myself and Agent Shea waited until approximately 11:30 that evening.

Q What is the location in The Bronx that you were driven to?

A I don't remember exactly. I believe it was in the vicinity of Tremont Avenue.

Q What did Tony Finn do, if anything, when you arrived there?

A The cab was parked outside of Tony Finn's residence and Tony went into his apartment building. Myself and Agent Shea waited outside for him in the cab.

Q Had you been given instructions earlier in the day what to do when you arrived up at Tony Finn's house in The Bronx?

MR. GRABER: I'm going to object to that. It requires hearsay.

MR. TIMBERS: This is simply to permit the jury to understand what he was doing.

THE COURT: Had he been given any instructions as to what to do when he arrived at Tony Finn's house?

MR. TIMBERS: That's correct.

THE COURT: Overruled.

A Yes, sir.

Q What were those instructions?

A I was instructed to wait at that location until I received word that --

MR. GRABER: I'm going to object, your Honor. This is hearsay. He was given instructions, not that he gave instructions, he was given.

MR. TIMBERS: This is not offered for the truth of what the instructions were.

THE COURT: Yes.

MR. GRABER: I beg to differ, your Honor. Obviously the statement is the statement.

THE COURT: Overruled.

MR. GRABER: Exception.

BY MR. TIMBERS:

Q Start again and tell the jury what the instructions that you were given were.

A Yes, sir.

My instructions were to wait at that location until I received word that the cocaine had been placed in the trunk of that vehicle. At that time Agent Shea was going to drive me back down to Canal and Allen Streets and I have going to drive the vehicle away from the location.

Q Were you told whose word you were to wait for?

A The way I remember it, sir, the word that I was going to receive came by first waiting to hear from --

Q No, I'm sorry. My question is on the instructions, were you told whose word you were to wait for?

A Yes, sir.

Q Whose word was that?

A It was Tony Finn.

MR. GRABER: If Your Honor please, if this isn't being offered for the truth of the instruction of the facts contained therein, I just don't understand. Obviously it is. I ask that it be stricken.

THE COURT: The objection is overruled.

BY MR. TIMBERS:

Q Did you talk to Tony Finn while you were waiting outside his house in The Bronx on the night of May 10th?

A Yes, sir.

Q At what time did you talk to him?

A Approximately 11:30.

Q Did you do anything after you talked to him?

A Yes, sir.

Q What did you do?

A Agent Shea drove me down to Canal and Allen Streets.

Q What happened when you arrived at Canal and Allen Streets?

A I entered the rental vehicle and drove it from that location back to the Drug Enforcement garage.

Q What happened at the Drug Enforcement garage?

A At that location Agent Peterson again searched the trunk of that car.

Q Did he find anything in the trunk?

A No, sir, there was nothing in the trunk and the money was not there also.

Q What was done after the trunk was searched?

A The car was parked in the garage and it was locked in the garage and after the garage was locked, myself and Agent Peterson left the garage.

Q What, if anything, did you do next in connection with the investigation of this case?

A I did nothing further that day. But on May 11th I again in the morning of May 11th went to the garage with Agent Peterson. Agent Peterson again searched the trunk of the car. There was nothing in it at that time. Then I drove the car out of the garage.

Q Where did you drive the car to?

A I again drove the car to Canal and Allen Streets. This time I was south of Canal, facing north. I arrived there approximately 12:30 in the afternoon, and I parked the car at that location.

Q Did you do anything in connection with this investigation on May 11th after that?

A No, sir.

Q You have testified that you drove the car to Allen Street twice and you drove it away from Allen Street once back to the garage.

During those trips did anybody ever enter the car other than Tony Finn, the person who was in it the first time you drove it to that spot?

A That I observed enter that car?

Q That's right.

A No, sir.

Q Did you have the trunk of the car within your range of observation at all times when you were driving the car?

A Yes, sir.

Q It was under your custody?

A Except for the time On May 10th that I left that location.

Q No, I'm just referring to the time between when you got in the car and drive it away and when you stopped the car and got out of the car.

During those periods of time did you have the trunk under constant observation?

A Yes, sir.

Q Did anybody open up the trunk during those times?

A No, sir.

Q Directing your attention to August 20th, 1973, did you do anything in connection with the investigation of this case on that date?

A Yes, sir, I did.

Q Will you tell the jury what you did?

A Yes, sir.

Approximately 7:20 in the evening on that date I entered a bar on 56th Street and Lexington Avenue called the Gion Bar. I believe it was a Chinese bar.

Q What did you observe when you entered the bar?

A When I entered the bar I observed Tony Finn talking at the bar with two other individuals, and I also observed Agent Smith seated at the bar.

Q Did you watch Tony Finn and the two other individuals?

A Yes, sir, I did.

Q Will you describe their conduct while you were watching them?

A They were in conversation and the two individuals that Tony was talking to had their backs to me, but would continuously during this conversation turn and look at me to see if I was still at that location in the bar.

MR. HOCHHEISER: Objection, your Honor. That's a

conclusion.

THE COURT: Yes, what they might have thought is a conclusion. That part of it will be stricken.

MR. HOCHHEISER: In fact, looking at me is a conclusion also. All he can say is they turned in his direction.

THE COURT: All right. That would be a proper response. The two men with Tony Finn turned in your direction is that it?

THE WITNESS: Yes, ma'am.

Q What, if anything, else did you observe with regard to these three individuals, Finn and the other two men?

A At one point in the conversation one of the individuals left the immediate area of the bar.

Q When you say"one of the individuals", you are referring to one of the individuals that Tony Finn was talking to?

A Yes, sir.

Q What else did you observe?

A A short time later he returned, within a minute or so, and again they engaged in conversation.

Q What happened after that?

A Approximately 7:25 an individual walked in and was greeted by Tony Finn. I should say that he was greeted by the

two individuals that Tony Finn was with, and after that initial greeting, then Tony Finn and this other individual had conversation.

Q What happened after Tony Finn and this other individual had conversation?

MR. HOCHHEISER: Would you repeat the question?

(Question read.)

A They left the bar.

Q Did they leave together or separately?

A They left together.

Q Is the person that Tony Finn left the bar with in the courtroom today?

A Yes, sir.

Q Will you point him out to the jury, please?

A It's the individual who is sitting there with the brown jacket on and glasses and the beard.

MR. TIMBERS: May the record reflect that the witness has identified the defendant Lubrano.

THE COURT: Yes.

Q Did you remain in the bar after Finn and Lubrano walked out?

A Yes, sir, I did.

Q What did you observe after that?

A The other two individuals that Tony Finn was talking

to initially still remained in the bar at that time. After about five minutes passed, that gentleman, Mr. Lubrano, reappeared at the bar.

Q What time would you place that at?

A Approximately 7:30, maybe 7:35.

MR. TIMBERS: I have no further questions for this witness.

MR. HOCHHEISER: Your Honor, before Mr. Graber commences, I just wanted to get some clarification. I didn't understand the last question and answer.

THE COURT: You want it reread; all right.

(Record read.)

xxxx CROSS-EXAMINATION

BY MR. GRABER:

Q What time on May 10th did you initially pick up this vehicle?

A Exactly I don't remember. I know it was sometime in the afternoon.

Q And this was at the DEA garage?

A Yes, sir.

Q When did you see Tony Finn for the first time that day?

A Approximately 5:30, maybe 6 p.m.

Q Where was that?

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* * *

exactly where I was positioned.

Q Did you see Tony Finn at all that day?

A No, sir.

MR. GRABER: I have no further questions, your Honor.

xxxx CROSS-EXAMINATION

BY MR. HOCHHEISER:

Q Agent Buceti, you made certain observations on August 20th, you said, is that right?

A Yes, sir, I did.

Q You say that you entered the Gion Bar about 7:30 p.m.?

A Yes, sir.

Q You saw Tony Finn talking at the bar with two other people?

A That's right.

Q Two other males?

A Two other males.

Q Were there other people at the bar also?

A Agent Smith.

Q Was he the only other person at the bar?

A There may have been, but I can't remember.

Q Is this a bar like just for agents and narcotics people?

A Not that I know of, sir.

Q Were there other people at the bar?

A Not that I remember, sir.

Q You saw Tony Finn talking at the bar with two others; is that right?

A That's correct.

Q You saw Smith seated at the bar?

A That's correct.

Q Where was Smith seated at the bar with respect to these three people?

A As you walk in you had to walk by Tony Finn and the two other individuals, and as you continued walking down the bar, Agent Smith was seated at that location.

Q In other words, as you walked in the bar, in the door, the bar would run lengthwise along your right or along your left; is that right?

A As I remember it, it was straight ahead of you. The bar ran straight, and Agent Smith was seated at the far end of the bar.

Q These three people, Finn and the two others were where?

A In the middle of the bar.

Q How many feet would that be?

A From me?

Q How many feet between Agent Smith and the three people at the bar?

A I'd have to guess at that. Approximately ten feet --

MR. TIMBERS: Objection.

THE COURT: Give us your best estimate.

THE WITNESS: Approximately ten feet.

BY MR. HOCHHEISER:

Q Ten feet from the middle of the bar to the end?

A As I remember it, sir.

Q How far would you say you are from me sitting there now?

A Twenty feet.

Q Do it would be halfway, the distance would be half of where you are to where I am?

A Yes, sir.

Q That is what you call ten feet?

A Yes, sir.

Q You say the two others had their backs toward you; right?

A That's correct.

Q And they were apparently talking to Finn?

A That's correct.

Q How long did they speak to Finn?

A While I was there they spoke to Finn for approximately five minutes.

Q You didn't see Philip Lubrano there at that time, right?

A Not when I first entered, no, sir.

Q What?

A When I first entered the bar, Mr. Lubrano was not present.

Q Were they standing close to each other?

A Yes, sir.

Q You say one of the individuals left the bar area and shortly returned within a minute; is that right?

A That's correct.

Q Did he go to get something?

A I don't know, sir.

Q You don't know anything, do you?

A Yes, sir.

Q You don't know where he went?

A No, sir.

Q And then he came back?

A That's correct.

Q And he spoke some more with our Mr. Finn?

A That's correct.

Q And they were standing close, weren't they?

A Yes, sir.

Q And so was the other man?

A Yes, sir.

Q Mr. Lubrano wasn't there at this time, was he?

A No, sir, he was not.

Q And then you say the man you identify as Mr. Lubrano entered the bar; is that right?

A He entered the bar, yes, sir.

Q And he was greeted by the other two people?

A Yes, sir.

Q Was he greeted by Mr. Finn?

A The initial greeting was between Mr. Lubrano and the other two individuals. Then he talked to Mr. Finn.

Q What did they say, "Hi"?

A I don't know.

Q Mr. Finn then greeted this man that you identify as Mr. Lubrano?

A That's correct.

Q Tony Finn and Mr. Lubrano you said then talked?

A Yes, sir.

Q Where were the other two people at this time?

A In the same area.

Q So now there were four men standing close to each other; right?

A Right.

Q Then you say Tony Finn and Mr. Lubrano left together?

A Yes, sir.

Q You say the other two people stayed in the bar?

A Yes, sir.

Q And after about five minutes Mr. Lubrano reappeared at the bar?

A That's correct.

Q Mr. Finn didn't reappear at the bar?

A No, sir, he did not.

Q There has been some testimony that on August 20th, 1973 Mr. Lubrano and Mr. Finn separately went into a building, number 141 East 55th or 56th Street --

MR. TIMBERS: Wait.

MR HOCHHEISER: Am I wrong?

MR. TIMBERS: You are talking about --

MR. HOCHHEISER: August 20th.

MR. TIMBERS: I don't think there has been testimony they went in separately. They left separately.

MR. HOCHHEISER: To this residential building.

MR. TIMBERS: Are you talking about October 4th?

MR. HOCHHEISER: Have I go my dates mixed up?

MR. TIMBERS: Right.

BY MR. HOCHHEISER:

Q The man you identified as Mr. Lubrano and Mr. Finn left; is that right?

A On August 20th, yes.

Q You didn't see where they went?

A I did not.

Q Then Mr. Lubrano reappeared at the bar after approximately five minues?

A Yes, sir.

Q Did Mr. Finn reappear?

A After Mr. Lubrano arrived, I left the bar approximately five minutes after his arrival, and at that time Tony Finn did not reappear at the bar.

Q On August 20, 1971 previous testimony has indicated that Mr. Lubrano and Mr. Finn were seen going into a luncheonette after exiting that bar. Are you familiar with that?

A Sir, I wouldn't know what happened in 1971.

Q You are connected with this case, aren't you?

A Yes, sir.

MR. TIMBERS: I think you misspoke, Mr. Hochheiser The year is '73.

MR. HOCHHEISER: I'm sorry.

Q There has been testimony on this day August 20th, that you are talking about here, that Mr. Finn and Mr.

Lubrano went into a luncheonette. Are you familiar with that? I'm not asking you if you saw it. Are you familiar with that aspect of the case?

A Yes, sir.

Q From the time that you saw Mr. Finn speaking with these two other men and from the time that you saw one of these men go somewhere and come back and from the time after that you saw the three of them talking, standing close to each other until the time that Mr. Finn left the bar with Mr. Lubrano maybe I correctly assume that there was no opportunity for anyone to search Mr. Finn in that period of time?

MR. TIMBERS: Is he referring to one of the people he was talking to or an agent? The question is not clear.

Q Do you understand the question?

A No, sir.

Q You said you saw Mr. Finn speaking to two other people not Mr. Lubrano in the bar, right?

Q Yes.

Q You said you saw one of these persons go somewhere and you didn't know where he went, right?

A Yes.

Q You said you saw the person come back, right?

A Yes.

Q And you said before Mr. Lubrano came in the three of them were now standing and once again talking together, right?

A Right.

Q Standing close together?

A Normal distance of conversation.

Q In a bar, normal in a bar?

A That's correct.

Q Was there a jukebox on?

A No.

Q No music?

A No music.

Q No music at all?

A Not that I remember.

Q And they were standing the usual distance, which was not far apart?

A Two feet, maybe.

Q As they were talking, were they touching each other in the normal course of things, a man touches another guy's arm?

A They were just conversing.

Q You can swear under oath that none of these people in ordinary conversation in a bar ever touched another person?

A The only time I observed any physical contact was when they first entered and shook hands. After that I did not observe any physical contact.

Q Were they drinking?

A I believe they all had drinks.

Q Did they have money on the bar?

A I don't remember.

Q While they were drinking and talking, did they have more than one drink?

A Not while I was there.

Q It's your testimony under oath that you can state that in the course of their conversation in this bar that one man did not touch another man's arm in order to get his attention in the conversation or hit him on the shoulder or anything like that?

MR. TIMBERS: Objection to form, your Honor. I don't think there is any necessity to refer to"under oath" and "you can state."

THE COURT: Yes. No necessity to refer to "under oath." The witness has been sworn.

MR. HOCHHEISER: I'm not suggesting it's necessary, your Honor.

THE COURT: Pardon me?

MR. HOCHHEISER: I was emphasizing a point, that's

all.

BY MR. HOCHHEISER:

Q Can you state that, sir?

A Yes, sir, I can.

Q Good.

A I'd like to explain why I can state that.

Q Maybe Mr. Timbers will ask you some questions later; okay?

A Okay.

Q You were watching them very closely to make sure none of these people gave Finn any drugs; is that right?

A Yes, sir.

Q But you didn't trust Finn at all, did you?

A I didn't know Mr. Finn well enough to know whether I can trust him or not.

Q And you watched very closely because you wouldn't have put it past Finn to take drugs from one of those other men, did you?

MR. TIMBERS: Objection. The witness'state of mind is not in issue in this case.

THE COURT: Yes, objection sustained.

Q And fortunately while these three men were drinking and talking, no one of them touched anyone of the others, right?

MR. TIMBERS: Objection to form.

Q I will change that.

It just so happens that while you were on alert for this problem that none of these three men ever touched the other during the conversation?

MR. TIMBERS: Objection to form again.

THE COURT: What is the objection?

MR. TIMBERS: Mr. Hochheiser should ask a straightforward question, not "it so happens, fortunately--"

THE COURT: Yes, sustained.

BY MR. HOCHHEISER:

Q As it happened, sir --

THE COURT: No, you can ask him whether he saw anybody touch anybody else.

MR. HOCHHEISER: I object, your Honor, to the Court and Mr. Timbers restricting the style and form of my examination. There is nothing wrong with it and I don't like the implication to the jury that there is something wrong with it, most respectfully, your Honor.

THE COURT: Mr.Timbers' objection was sustained and is still sustained, as it just so happened.

Q Sir, you were watching to make sure that nobody gave anything to Mr. Finn, right?

A Well, that wasn't my primary reason for being there.

That was one of the reasons I was watching.

Q You were watching to see that Mr. Finn did not surreptitiously or otherwise take anything from these two men?

A I was there to observe any transaction that occurred in my presence.

Q You knew that Mr. Finn's assignment was to purchase drugs from Mr. Lubrano, didn't you?

A Yes, sir.

Q And you knew that Mr. Finn was not supposed to take drugs from anyone else, didn't you?

A No, sir.

Q You didn't know that?

A No, sir.

Q So you watched?

A That's correct.

Q And they stood close to each other in this bar and talked?

A That's correct.

Q And one of the men went somewhere and came back?

A Yes, sir.

Q And you don't know where he went?

A That's correct.

Q And you don't know what he did when he went there?

A No, sir.

Q And then there came a time when Finn and the man that you identify as Lubrano left this bar, right?

A Yes, sir.

Q And from the time that you saw Finn in this bar until the time he left with this man that you identify as Lubrano, there was no opportunity to search Finn, isn't that correct?

A That's correct.

Q Did you ever see Mr. Lubrano on August 20th in possession of any cocaine?

A No, sir.

Q Did you ever see Mr. Lubrano during the period of your observations give this Finn any cocaine?

A No, sir.

Q Your job was to watch and observe to see any transfer that might be observed, wasn't it?

A That's correct.

Q And you didn't see any, did you?

A Not while I was in the bar, sir, no, sir.

MR. HOCHHEISER: Thank you.

MR. GEOLY: Judge, may I be permitted a few questions?

THE COURT: Yes.

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these two individuals in the bar, at that point I did not know who Philip Lubrano was.

Q Were you surprised when Lubrano and Finn left the bar together?

MR. HOCHHEISER: Objection, your Honor.

THE COURT: Yes, that calls for a conclusion as to whether someone was surprised.

Q What was Mr. Lubrano wearing on this day?

(No response.)

Q Do you recall what Mr. Lubrano was wearing?

A Not completely.

Q Why don't you tell what you can remember.

A At that time his hair was much longer, his beard was longer, and he was wearing a brown khaki safari-type shirt.

MR. TIMBERS: I have no further questions.

THE COURT: Anything further?

If not, the witness is excused.

We are going to recess now until 2:10 for lunch --

MR. HOCHHEISER: Your Honor, there is one other question, I'm sorry.

xxxx

RECROSS-EXAMINATION

BY MR. HOCHHEISER:

Q You said that you were sitting around one curve

of the bar and the two men were sitting around the curve of the bar, of the other curve, right?

A No, sir. The bar was in the shape of an L. They were situated at the straight part, the long part of the bar. I was seated at the short part that joined the long part.

Q Their backs were to you?

A The two individuals seated, talking with Tony Finn had their backs to me.

Q May I correctly assume then that you couldn't see their hands at all times?

A At all times I could not observe their hands, but I could observe Tony Finn's hands.

Q At all times you could observe Tony Finn's hands?

A That's correct.

Q Both hands?

A Yes, sir.

Q But their hands you could not observe at all times?

A They were seated with their backs to me. I could not see their hands.

Q That's what I want to know.

A That's correct.

MR. HOCHHEISER: Thank you.

THE COURT: Is there anything further?

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ellk (518)

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AFTERNOON SESSION

January 14, 1975
2:20 p.m.

(In open court; jury not present.)

MR. TIMBERS: I'd like to alert the Court to one possible logistic problem we may run into this afternoon.

The Government has a video tape it may play towards the end of the Government's case. The Video tape equipment is set up to be operated in 2804. During the luncheon break we tried to get somebody from the Drug Enforcement Administration to come down and reset that equipment up down here in 318, but we can't get anybody to come down today. We will be able to get somebody to reset the equipment up tomorrow.

Therefore, if we finish our case today we may not be able to put that last piece of evidence in unless we go up and adjourn to 2804.

THE COURT: But it is working in 2804, is that it?

MR. TIMBERS: Yes. I would suggest we simply proceed. It may be that we will never get that far.

THE COURT: All right. Let's proceed that way.

MR. TIMBERS: The next witness is Paul Sennett.

(The jury entered the courtroom.)

P A U L S E N N E T T, called as a witness by

ellk (519)

the Government, having first been duly sworn, testified as follows:

xxxx

DIRECT EXAMINATION

BY MR. TIMBERS:

Q Mr. Sennett, by whom are you employed?

A By the Drug Enforcement Administration.

Q What is your position with the Drug Enforcement Administration?

A Special agent.

Q Were you so employed in May of 1973?

A Yes, I was.

Q Directing your attention to May 10, 1973, did you conduct surveillance in connection with this case?

A Yes, I did.

Q Will you tell the jury where you were and what you did?

A I was with my partner, Kieran Kobell, in the vicinity of Canal and Allen Streets.

MR. GRABER: Your Honor, could we establish the time?

Q What time were you there?

A Approximately 5:30 p.m.

Q What did you do or observe while you were there?

A Agent Kobell and myself were positioned on Allen

Street north of Canal, a few blocks from the vehicle, the undercover vehicle.

Q Is this the car referred to as the rental car?

A That's correct.

MR. GRABER: If Your Honor please, I didn't get -- was it two blocks or a few blocks?

THE WITNESS: I said a few blocks.

MR. GRABER: Thank you.

Q What happened when you were stationed there?

A Agent Kobell and myself were more or less out of the picture, so to speak, until --

Q When you say "out of the picture," what are you referring to?

A We were not that close where we could observe the rental vehicle, so that we were more or less waiting on radio transmission from the other agents on surveillance at this time, and that we were to take anybody away from the area --

MR. GRABER: I'm going to object to that, your Honor.

THE COURT: What are you objecting to?

MR. GRABER: His purpose for being there. It's what he's stating basically is hearsay, state of mind, and I think it's irrelevant and immaterial.

ellk Sennett - Direct

THE COURT: Overruled.

Q What were your instructions?

A We were to follow Mr. Vitale's vehicle from the area when we were advised over the radio from the other surveillance agents.

Q Did you receive any advice over the radio?

A Yes, we did.

Q What did you do after you received that advice?

A We started following the vehicle with Mr. Vitale.

Q What kind of vehicle was that?

A It was a maroon Cadillac. We followed it only for a block or two and then it was lost in the traffic and we broke off surveillance.

Q Directing your attention to the next day, May 11th, 1973, did you conduct further surveillance in connection with this case?

A Yes, we did.

Q Will you tell the jury what you did on this date, giving places and times.

A We were approximately 6:00, 6:30 we were stationed in the vicinity of East 56th Street and Lexington Avenue, near Kat Vin Jewelry Store on the east side of Manhattan. I was with my partner Agent Kobell, again.

Q What happened when you were there?

A Approximately 6:30 Agent Kobell and myself saw an individual meeting the description of Mr. Vitale enter Kat Vin Jewelers and also repeatedly walked into Kat Vin Jewelers and into the Gion Bar --

MR. GRABER: Your Honor, I object to this testimony, answering the description of Mr. Vitale is not an identification.

Q Had you been given a description of --

MR. GRABER: I am going to object to that too, your Honor. It's either Mr. Vitale or it is not.

THE COURT: Just one moment. I will let Mr. Timbers finish his question, I think, which may resolve it.

Q Had you been given a description identifying the person you were to watch for in the vicinity of Kat Vin Jewelers?

MR. GRABER: I object to that also, your Honor.

THE COURT: Overruled.

MR. GRABER: It's hearsay. He's testifying as to what somebody else told him.

MR. TIMBERS: I hadn't asked that question yet.

MR. GRABER: Have you been given a description, it's implicit in that statement that somebody said something and he heard it.

THE COURT: That objection is overruled.

MR. GRABER: Exception.

BY MR. TIMBERS:

A Who gave you that description?

A The surveillance agents, other surveillance agents on that date that were down on the lower east side of New York.

Q Did you observe somebody who met the description that those surveillance agents had given you?

A Yes, it did.

Q Is that person in the courtroom today?

A Yes.

Q Would you point to him, please?

A It's the gentleman on the end with the blue suit and the wire rim glasses.

Q The far end from me?

A Yes.

MR. TIMBERS: May the record reflect that the witness has identified the defendant Vitale?

THE COURT: Yes.

Q What did Mr. Vitale do when you saw him in the vicinity of Kat Vin Jewelers on May 11th?

A Just for a few minutes he walked into the jewelry store and he walked back into the Gion Bar, into the area of the Gion Bar which is just a door or two away from Kat Vin

Jewelers.

About 15 minutes later he left the area. At one point Mr. Vitale went over to a policeman, spoke to him, pointed to Agent Kobell and myself, and then we did not see him any more.

Q What happened after you observed Mr. Vitale doing what you just described?

A Mr. Vitale left in a vehicle buy we could not get back to our vehicle in time to follow him.

Q What did you do after that?

A We proceeded down to the vicinity of Canal and Alle Streets to join up with the other surveillance agents.

Q What happened after that?

A I believe at this time an individual had placed a package --

MR. GRABER: I am going to object to that, your Honor, unless he can state of his own knowledge, his own observations.

THE COURT: Yes.

Q Just tell what you saw.

A We were advised over the car radio that --

MR. GRABER: I am going to object to what he was advised.

THE COURT: Over the car radio from another agent?

THE WITNESS: That's correct.

THE COURT: Overruled.

Q I'm merely focusing on what you did when you got down there.

What was happening on the surveillance? What did you do, what did the other agents do?

A We met with the other surveillance agents. They told us that it was over and they were bringing the rental car back to the garage.

Q Did you go back to the garage?

A Yes.

Q I'm going to skip over what you did there in order to save time.

Directing your attention now to August 20th, 1973, did you participate in the investigation of the case on that day?

A Yes, I did.

Q Will you tell the jury what you did?

A It was approximately 7:30 p.m. I was also with my partner Agent Kobell, and Tony Finn and Philip Lubrano came out of the Gion --

Q Whereabouts were you?

A I was positioned in the vicinity of East 56th and Lexington Avenue near Kat Vin Jewelers. And around 7:30

Tony Finn and Philip Lubrano exited the Gion Bar and entered the Gaiety East Luncheonette which is right around the corner from Kat Vin Jewelry Store. And I was told to go in and to identify Lubrano, get a good look at him.

Q When you say "identify," what do you mean by that?

A To see exactly, you know, get as close as I could to him so that I could identify him at at later time. And I entered the Gaiety East and Mr. Lubrano was coming out at that time and we walked passed each other. Then I went back outside and joined other surveillance agents.

Q Is Mr. Lubrano in the courtroom today?

A Yes, he is.

Q Will you point to him for the jury?

A Yes, sir. He's the gentleman sitting closest to you.

MR. TIMBERS: May the record reflect that the witness has identified the defendant Lubrano.

THE COURT: Yes.

Q What happened after that?

A We remained on surveillance until I believe it was 12:30 that night. No, I'm sorry, until around 9:00, approximately 9:00 p.m.

Q Did anything else happen while you were on sur-

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Q Did you talk to Mr. Timbers?

A Yes, sir.

Q Is your testimony now based on recollections refreshed by the report?

A Yes.

Q And that's it?

A Yes, sir.

Q You didn't make that report up that you read from, did you?

A No, I did not.

Q It was other people's work that you read there?

A That's correct.

Q What was that message you received just prior to arriving at the vicinity of Canal and Allen Street?

A The exact words --

Q Well --

A I don't know the exact words. It's just that, you know, the deal had been terminated.

MR. GRABER: Thank you.

xxxx CROSS EXAMINATION

BY MR. HOCHHEISER:

Q Agent Sennett, your first entry into this case was on May 10th, 1973; is that right?

A That's correct.

Q And you are a special agent with the Drug Enforcement Administration; is that right?

A That's right.

Q When we say "special agent," that doesn't mean that there is anything special --

MR. TIMBERS: Objection, your Honor.

Q Maybe I phrased it wrong. I'm not trying to put you down. But in other words, the term "special agent" means that you are an agent of the Drug Enforcement Administration?

A That's correct.

Q You are in no different position then the other agents, I take it?

A That's correct.

Q There were other agents who would be supervising agents and chiefs, etcetera?

A That's right.

Q Your job involves among other things, skills or methods such as tailing and surveillance, things like that; right?

A That's correct.

Q Much like if I were to describe my job, I'd say cross-examination was part of it, right? Okay.

On May 10th, 1973, as part of your job, one of the first things you did in this case, you were assigned to follow

an automobile, right?

A Correct.

Q And you lost it in traffic?

A That's correct.

Q So the next day, second day of this case, you were told to do certain things; is that right?

A Yes, sir.

Q Were you told to watch Kat Vin Jewelers?

A Yes.

Q That is a jewelry shop that Philip Lubrano, my client works, the lessee of, is that right? You accept that?

A Yes.

Q And you were told to watch this, right?

A Yes.

Q And you were told a little bit about the case.

On the second day that you participated in this case, you watched the store; is that correct?

A Correct.

Q And you were told to watch for a particular man, that Mr. Graber asked you about, given a certain description, etcetera, right?

A Yes, sir.

Q I know you didn't take any notes. Does that mean that you didn't write down a description either?

A That's right.

Q So you kept it in your head. In watching the store you were told to watch, in watching for an individual you were told the day after you lost the car in traffic you say you saw an individual fitting this description go into the store; is that right?

A Yes.

Q Will you tell the ladies and gentlemen of this jury, did you ever see Philip Lubrano in that store at that time?

A At that time?

Q Yes.

A No, sir.

Q Did you see this individual who you were told to watch on the second day of your entry into this case, did you ever see this individual, this man you describe as Vitale, in that store?

A On that day, no, sir.

MR. TIMBERS: Could I have that question and answer read back?

(Record read.)

Q This man that you say was Vitale, you never saw him on that day speaking to Mr. Lubrano, is that right?

A Not speaking to Mr. Lubrano, no.

Q By the way, when I asked you the questions, you repeated a couple of times on that day, you prefaced your answer. Did you ever see Mr. Vitale and Mr. Lubrano speaking together on any day that you were making surveillance in connection with this case?

A No, sir.

Q Was there any particular reason that you told the jury that you didn't see --

MR. TIMBERS: Objection, your Honor.

MR. HOCHHEISER: I will withdraw the question.

BY MR. HOCHHEISER:

Q So you never saw them talking?

A Saw Mr. Vitale enter the shop on May 11.

Q Yes, but my question is: Did you ever see Mr. Lubrano speak with Mr. Vitale?

MR. TIMBERS: This question has been asked once already and answered. Objection, therefore.

THE COURT: I will let him ask it again.

Q Sir?

A No.

Q You also mentioned, Mr. Graber asked you some questions and you were talking about the traffic conditions and you said maybe you were waiting for a light.

As an agent of the Drug Enforcement Administration

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comments like "naturally," etcetera.

THE COURT: I think the whole question should be stricken and the answer. The witness is not here to tell us what is possible or what might have happened. The witness is called into court to tell us only what did happen, so that question and the answer are stricken.

Now, proceed.

MR. HOCHHEISER: I have an exception to your Honor's ruling.

BY MR. HOCHHEISER:

Q On May 11 and May 10, 1973, you never saw Mr. Lubrano; is that right?

A No, sir.

Q On August 20 you say you saw a man who you identify as Lubrano; right?

A Yes.

Q How long an observation was that?

A From the time he left the Gion Bar to the time he entered the Gaiety East, which would be just a few stores away. The exact time, 30 seconds.

Q You said the purpose that you had or the job for that particular moment was to get a good look at him so you could identify him; is that right?

A I was told to go inside and to take a look at

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Q During the course of this trial while you have been outside, passing the time of day with your fellow agents and in the area, you have seen Mr. Lubrano on numerous occasions, right?

A Yes.

Q Sir, I direct your attention to the time on August 20, 1973 when you say you were observing the luncheonet You say that you saw the man you identify as Lubrano leave the Gion Bar and go into the luncheonette; did you say that?

A Yes.

Q Then you went into the luncheonette?

A When he was inside, yes.

Q Did you see him do anything?

A No, sir, he was coming out when I was walking in.

Q Did you see Mr. Finn in there?

A At that point, no.

Q Did you see Mr. Finn go in there?

A Yes.

Q You didn't see Mr. Lubrano give Mr. Finn anything, did you?

A No, sir.

Q Did you see Mr. Finn come out?

A No, I did not.

Q You didn't?

A No.

Q You say you saw Mr. Finn go in?

A With Mr. Lubrano, yes, sir.

Q When you went inside the luncheonette, did you see Mr. Finn inside?

A I didn't see Mr. Finn, no, sir.

Q You just saw Mr. Lubrano?

A That's correct.

Q Where was Mr. Lubrano?

A He was walking out the door.

Q And he just walked past you?

A That's correct.

Q And that's all you saw Mr. Lubrano do?

A Yes.

Q How long did you stay there?

A In the luncheonette, I left seconds after he left, and went back to the vehicle.

Q Did Finn stay in the luncheonette?

A I said I did not see him in there.

Q Was there any other agent in the luncheonette?

A Not to my knowledge.

Q Do you know if anyone left before Mr. Lubrano left?

A I'm not sure.

Q Do you know what Mr. Finn was wearing when you saw

him go in?

A Mr. Finn was wearing white Levi's, I believe, or white tight Levi's.

Q When you saw him go into the luncheonette, where were you?

A Across the street on Lexington.

Q From across the street, sir, could you tell whether Mr. Finn had anything in his pocket?

A No, sir.

Q You couldn't tell that from across the street?

A I didn't see him.

Q What?

A I did not see Mr. Finn come out.

Q That's not my question. I understand. When you saw Mr. Finn go in, you said you were standing across the street from the luncheonette?; right?

A Not directly. Diagonally across, yes, sir, on the corner.

Q At that time and place you say that you couldn't say whether Mr. Finn had anything in his pocket --

MR. TIMBERS: Objection. That is not what the witness testified to. I will have the record read back if you wish.

MR. HOCHHEISER: I will ask him.

BY MR. HOCHHEISER:

Q I'm asking you, from where you were standing when you saw Finn go in, is it fair to say that you couldn't tell whether he had anything in his pocket?

A That's correct.

Q That's a correct statement.

After all this was over, that is, after your observation in the luncheonette was completed, that was your total observation of Lubrano; is that right?

A Yes.

Q That's the whole business?

A That's right.

Q He passed you on the way out?

A Yes.

Q How long would you say that took?

A From the time he walked from the bar with Finn into the restaurant, and when I walked past him, not very long at all.

Q Aside from the time when he walked past you coming out of the luncheonette, aside from that, what was the closest you were to him?

A 50 feet.

Q 50 feet?

A Right.

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A No.

Q But they drove like that anyway?

A I said they drove in an erratic fashion.

Q So because you broke off surveillance you can't tell us where they went or who they were?

A No, sir.

MR. HOCHHEISER: Thank you, thank you, your Honor.

THE COURT: Any further cross-examination?

MR. GEOLY: No further cross.

MR. GRABER: Just bear with us a moment, your Honor.

(Pause.)

MR. GRABER: We have no further cross, your Honor.

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REDIRECT EXAMINATION

BY MR. TIMBERS:

Q Mr. Sennett, directing your attention to May 11, 1973 during the time that day when you followed the maroon Cadillac north on Allen Street and then lost touch with it, had you been given any particular instructions with regard to surveillance of that car, how closely you should follow it?

A We were told not to burn it.

Q What does that mean?

A That means not to have a close surveillance. If there was any -- if there was a possibility of the person

driving the vehicle to notice surveillance, to break off immediately.

Q There was some questions about your reviewing the reports in this case and there was a question about whether you had written any notes about what you did. Can you tell the jury how, if at all, you contributed to the writing of the report of the events you have just described?

A My surveillance and my recording a tape recording.

Q Let me ask you this: After you participated in an investigation, how is the report written up?

A By the case agent usually writing the report, conferring with the agents that were on surveillance.

Q Did you confer with the agent who wrote up the case report of the events that you have just described?

A Yes, of course.

Q So his report was based on your oral communcations to him?

A That's correct.

MR. TIMBERS: I have no further questions.

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RECROSS-EXAMINATION

BY MR. GRABER:

Q Sir, you are saying that part of your recollection is based on a tape recording you made of the event?

A This is on October 4th.

Q That you made a tape recording on October 4th of your recollection of these events?

A No, I said that on October 4th I made a tape recording which has been -- it's not been allowed in court.

Q Basically, sometime immediately after the events you describe on May 10 and May 11, you spoke to other agents regarding those events at about that time; is that correct?

A Yes, sir.

Q But you in no way participated in the writing of these reports, did you?

A No, we just confer, we told them our observations.

Q And they didn't ask you for approval, to read it over and see what's right and what's wrong; is that correct?

A That's correct.

Q Doesn't it happen that sometime you tell somebody about it and the version that you gave is a slightly different-

MR. TIMBERS: Object.

THE COURT: This is asking the witness to speculate.

MR. GRABER: I will withdraw the question, your Honor, rather than belabor it.

THE COURT: We are beyond the scope of the re-direct, aren't we?

MR. GRABER: I don't know, your Honor. Mr. Timbers

did redirect him regarding how the report was made, and so on, and I think I have a right to go into it.

THE COURT: All right. Maybe I don't recall the same --

MR. TIMBERS: I'm sorry, your Honor, I did ask him how the report was prepared.

BY MR. GRABER:

Q So that you did not see this report until sometime either last week or perhaps even this week; is that correct?

A That's correct.

Q And that's approximately over a year ago?

A That's correct.

Q During that period of time, you have had other cases, have you not?

A Yes.

Q And isn't it a fact, sir, that you are basing your testimony now about recollections that occurred some year or so ago on the basis of other men's recollections and not your own?

MR. TIMBERS: Objection. That goes contrary to what he's testified to.

THE COURT: Yes. Sustained.

MR. GRABER: No further questions.

MR. TIMBERS: The Government has no further questions.

of this witness.

THE COURT: Thank you. You may come down.

At this time we will take a 15-minute recess. The jury is excused.

(The jury left the courtroom.)

MR. HOCHHEISER: If the Court please, your Honor, motion on behalf of Mr. Lubrano for a mistrial on the grounds that Mr. Timbers in redirect examination quite pointedly asked this agent a question concerning what he based his recollection on, and the agent quite purposefully, quite intentionally and quite carefully made sure that he told this jury that he created a tape on October 4, 1973, which tape he told this jury was suppressed from evidence.

Nothing I can do about that, your Honor. The tape of October 4, 1973 has been suppressed from evidence as inaudible. This officer has intentionally told this jury pursuant to a question by Mr. Timbers that he made a tape of the transaction of October 4th which tape was, in his words, not allowed in court.

I move for a mistrial.

THE COURT: I don't understand the point. How does that prejudice your client? I'm not following this.

MR. HOCHHEISER: It prejudices my client because the jury now knows that there was a tape recording and would

have to infer that that recording corroborates the theory of the Government's case, having been made by the Government when, in fact, the Court's ruling in effect says that the tape recording has no such reliabiltiy or validity as to be permissible to have such consideration by the jury.

It has, just as any evidence, if evidence of a search and seizure is suppressed and it's brought into a court, it's improper. If evidence of a privileged nature is suppressed and it is brought into court, it's improper. No witness can tell a jury that he did something and there is in existence some piece of evidence which a Court has suppressed so a jury can not hear it.

What is the purpose of such testimony, and what is the obvious impact of such testimony, and that's my motion.

THE COURT: Do you have a reply, Mr. Timbers?

MR. TIMBERS: Yes, your Honor, the record will speak for itself as to what happened, but my recollection is that I asked Agent Sennett in connection with my questions about preparing the report a question that I can't even remember now, but he gave the answer that he had done various things in this case including preparing a tape recording, which I know in fact he did prepare. He was the agent who recorded the October 4th tape recording.

Realizing that was what he was talking about, I sat

down without asking him anything else about that. Mr. Graber got up and went into that subject and forced Mr. Sennett to tell about the October 4th tape recording. I'm sorry that we got into this, it was due to an error, but it certainly was not the Government's fault and I don't think the jury has any appreciation of what Agent Sennett was talking about. As far as they know, this all came up in the context of a discussion of the notes that were prepared in connection with recording and reports and things of that sort, what happened. I think the jury probably thinks that what is being talked about is some tape recording that was prepared in connection with the writing of the report of the October 4th transaction.

THE COURT: When the witness spoke that was my initial impression, that he was saying that he, the witness, made a tape recording of his experiences.

MR. GRABER: That's correct, your Honor.

THE COURT: Which was disallowed.

MR. GRABER: No, your Honor. Apparently -- you see, there is where I was misled.

MR. HOCHHEISER: Essentially --

MR. GRABER:--And I believe, essentially. I got up here to recross this witness believing that he had made a tape recording of his recollections. This witness knew that the tape recording obviously from his answer, he knew from the

tape recording referred to a recording that your Honor had suppressed because of inaudibility, and the tape recording he was referring to was the tape recording which the Government alleges that Mr. Lubrano and Mr. Finn participated in.

If your Honor pleases, that is what Mr. Hochheiser is talking about. When I got up here I asked that witness about what I believed and the impression that he left with me, and obviously your Honor, was that he was talking about a tape recording that he had made where he just put down his recollections. I was going to ask him that question, my intent there was to ask him to get an affirmative answer and then to make a demand on Mr. Timbers for that tape recording under 3500, which we'd be entitled to. That was my sole intent.

I had no idea he was referring to an October recording. The recording -- or whatever date it was, that your Honor suppressed. Nor did your Honor. And I say that he knew. And I say also that Mr. Timbers knew.

MR. TIMBERS: Your Honor, I resent that. I --

THE COURT: The motion is denied on the grounds that it is not clear what the agent was referring to.

My impression was that the agent had made a tape recording of what transpired and the jury may have the same impression, and therefore the motion has to be denied, because

it is not so prejudicial what occurred, as to deny the defendants a fair trial.

We will take a recess for ten minutes.

MR. HOCHHEISER: Could I just make one statement for the record?

THE COURT: Not now, because the reporter is tired.

MR. HOCHHEISER: When we come back, may I, your Honor?

(Recess.)

(In the courtroom in the absence of the jury.)

MR. HOCHHEISER: If your Honor please, I just wanted to complete one thought which will be very short, for the record.

TE COURT: Not on the motion that I just ruled on.

MR. HOCHHEISER: For the record, Judge, so I can have something to point to. I'm not asking you to reconsider.

THE COURT: No. What we have had in this case and we have had it throughout; every time I make a ruling, you start up with the arguments again.

MR. HOCHHEISER: No, I don't want to argue, Judge.

THE COURT: You have had a opportunity to argue the motion. I have heard it. Each lawyer has expressed his views, and I make a ruling and you want to add something else.

MR. HOCHHEISER: Judge, I don't want to argue with

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you --

THE COURT: Do you have a new motion?

MR. HOCHHEISER: Otherwise, I have nothing to address myself to --

THE COURT: No, that's only going to start up a new argument. You can't go on arguing a motion after I have ruled. I have said it three times now. You had an opportunity before I ruled to say anything you wanted. You had it, you repeated it, I ruled. Then every time, the record will show that I have made a ruling, some defense counsel will make an argument.

How many more witnesses do you have?

MR. TIMBERS: Your Honor, three or four.

THE COURT: Were we through of this witness?

MR. TIMBERS: I believe we are. I thought, in fact, he had been excused.

THE COURT: I thought so too; that's why I don't know why he's here.

Do you have another witness?

MR. TIMBERS: Yes.

THE COURT: How many more witnesses do you have?

MR. TIMBERS: Four, I believe.

THE COURT: Are they long witnesses?

MR. TIMBERS: One will be a long witness.

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Q Mr. Kobell, by whom are you employed?

A I am employed by the Drug Enforcement Administration.

Q What is your position with the Drug Enforcement Administration?

A I am a special agent.

Q Were you so employed in May of 1973?

Q Yes, I was.

Q Directing your attention to May 10, 1973, did you conduct surveillance in connection with the investigation of this case?

A Yes, I did.

Q In order to save time, I'm not going to ask you about what you did on that date, but move on to the next date.

Directing your attention to May 11, 1973, did you conduct surveillance in connection with this case?

A Yes, I did.

Q Will you tell the jury what you did on May 11, 1973, giving places and dates and times.

A Well, on May 11 I was on surveillance in the vicinity of Allen Street and Canal Street, which is on the lower east side of Manhattan. And I was there for the purpose of observing a narcotics transaction which was to take place --

MR. GRABER: I'm going to object to "observing a narcotics transaction," your Honor

Q Just tell what you did.

THE COURT: Yes, the answer is stricken.

A Well, I was on surveillance there and there came a time when I was advised to proceed to Kat Vin Jewelry Store which is on East 56th Street near the intersection of Lexington Avenue. And I drove up there and parked my car on East 56th Street and I got out and after a short time I observed --

Q Before you proceed, were you by yourself?

A No, I was not.

Q Who were you with?

A Agent Sennett.

Q Proceed.

A Part of my instructions were to proceed to that location and establish surveillance for --

MR. GRABER: If your Honor please, may I have an objection regarding any instructions that he had.

THE COURT: Overruled.

MR. GRABER: Your Honor, to save time may I just have a continuing objection vis-a-vis that?

THE COURT: All right, yes.

BY MR. TIMBERS:

Q Proceed.

A It's not clear about the objection. Can I proceed

with my instructions?

Q Yes. Start from the beginning about what you did up at Kat Vin Jewelry and tell what happened at Kat Vin Jewelry.

A Yes. At Kat Vin Jewelry I observed Victore Vitale as he was entering the Kat Vin Jewelry and I observed him on a number of occasions as he came out of Kat Vin Jewelry; he walked down a few doors and into a bar called the Gion Bar, and I observed him -- it appeared as if he was making some phone calls.

MR. GRABER: I am going to object to what "appeared."

THE COURT: Yes.

Q What did you observe?

A I observed him --

THE COURT: Just one minute.

(Pause.)

BY MR. TIMBERS:

Q Agent Sennett, before you continue with what you observed at Kat Vin, did you give us the time that this happened on May 11th?

A I can't exactly. It was in the evening. It was around 6 o'clock somewhere. I observed Mr. Vitale enter the Gion Bar and pick up the phone receiver and dial the phone, and hung up the receiver and he walked out of the Gion Bar,

back into the Kat Vin Jewelry and he repeated that procedure several other times.

Then there came a time when Mr. Vitale came out of Kat Vin Jewelry Store and he walked to a New York City police officer who was on patrol at the corner of East 56th and Lexington and I observed Mr. Vitale show the police officer something, some piece of paper or card and Mr. Vitale pointed. I was standing with Agent Sennett at the time and Mr. Vitale pointed in our general direction and appeared to be engaged in conversation with the police officer. And shortly after that Mr. Vitale left the vicinity of East 56th and Lexington.

Q Had you ever seen Mr. Vitale before you saw him on this occasion?

A Yes.

Q Had you seen him on this date, May 11?

A No. On May 11 the first time that I saw him was at Kat Vin Jewelry Store.

Q When you were instructed to go uptown and conduct surveillance, were you given a description of what he was wearing that day?

A Well, I don't recall if I was.

Q Do you see Mr. Vitale in the courtroom today?

A Yes, sir.

Q Will you point to him for the jury, please?

A Well, Mr. Vitale is the gentleman to my right, extreme right. He has wire rim glasses on, he's wearing a moustache and a blue suit, and he's behind defense counsel table.

MR. TIMBERS: May the record reflect that the witness has identified the defendant Vitale?

THE COURT: Yes.

Q Moving on to August 20, 1973, did you conduct surveillance in connection with the investigation of that case on that date?

A Yes, I did.

Q Giving the times and locations to the best of your ability, will you tell us what happened on August 20?

A Yes. I had established surveillance. My position was on Lexington Avenue between 56 and 57th and I was on the east side of Lexington, facing south. Surveillance was established at perhaps 6:30 or so, I really don't recall the exact time that surveillance was established. But there came a time and it was about 7:30 when I observed, I was seated in my car and I observed Mr. Finn and Lubrano walk around the corner from East 56th Street onto Lexington Avenue and go north on the west side of Lexington and together they entered a restaurant called the Gaiety East.

Q Did you see what they did inside that restaurant?

A No, I did not.

Q What were your instructions at that time?

A At that particular time I had no instructions, really. I knew what was happening and at the time I was very aware of looking at Mr. Finn and at Mr. Lubrano. I wanted to make sure that I knew that I could identify Mr. Lubrano in the future and I wanted to make sure that they were both together and I wanted to make sure that I knew where they were going. So my instructions, I really didn't have a set of instructions. My responsibility was surveillance of those two people.

Q What was Mr. Lubrano wearing when you saw him come around the corner going to the Gaiety East?

Q He was wearing a tan bush jacket. It was quite blousy and it was not tucked into his pants. That is the only thing I recall him wearing.

Q Do you recall what Mr. Finn was wearing?

A Mr. Finn was wearing a pair of white Levi pants and a knit sports shirt which I believe also was not tucked into his pants.

Q Did you observe anything after the two individuals went into the Gaiety East Restaurant?

A Yes. After a short while I observed Mr. Finn walk

out of the Gaiety East and at the time he walked out he -- as he was walking into the Gaiety East he was aware of my presence --

MR. GRABER: Objection, your Honor, as to what he was aware of.

THE COURT: Yes, don't tell us what somebody else was aware of.

THE WITNESS: Yes, your Honor.

A And as Mr. Finn walked out I was very intent on maintaining continuous surveillance on the entrance to the Gaiety, and as he walked out I looked at him very, very good, and Mr. Finn looked in my direction, looked at me, and we had eye contact, and at that time he gave me sort of a raised eyebrow and to me it indicated a signal --

MR. HOCHHEISER: Objection, your Honor, to a conversation, if not a verbal conversation, between a man who is not here to be cross-examined and this witness. Hearsay. He's going to tell us what he thought an absent person meant.

THE WITNESS: No, sir, I said what he did, exactly.

THE COURT: No, don't tell us any conversation. Just tell us what occurred. Proceed.

A Mr. Finn looked right at me, right in my eye and he gave me a raised eyebrow like a signal --

MR. HOCHHEISER: May I object, your Honor. I think

the witness realized what the objection is. I'm asking your Honor to instruct the witness --

THE COURT: Is this a prearranged signal?

THE WITNESS: No, your Honor, it was a spur of the moment thing. He knew I was there and he looked at me --

MR. GRABER: I'm going to object to what he knew.

THE COURT: He looked at you. Proceed.

A And I noticed as Mr. Finn came out with a bulge, a long thin bulge in his left pants pocket.

In those circumstances, I transmitted a message over to my car radio that Mr. Finn had completed a narcotics transaction. I said, "He has the package." And with that Mr. Finn walked to a parking garage. I followed him there, where he had parked his car, and he claimed his car and then proceeded to a prearranged location, and I surveilled him to that prearranged location and at that prearranged location Mr. Finn met with Agent Peterson and Mr. Peterson joined Mr. Finn and I then proceeded back up to the vicintiy of East 56th Street and I reestablished surveillance there with the members of my group.

Q Moving on, did you speak with Mr. Vitale in June of 1974 on the date of his arrest?

A Yes, I did.

Q Will you describe that conversation to the jury,

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how long?

A No, I really can't.

Q Were you up there an hour?

A I have no idea, sir.

Q You have no recollection of it at all?

MR. TIMBERS: Objection, your Honor. That's repeating and repeating and repeating the same question. The witness has made it quite clear that he has no recollection of the time he was up there.

THE COURT: Yes. Objection sustained.

MR. GRABER: I have no further questions, your Honor.

THE COURT: Any further cross-examination of this witness?

MR. HOCHHEISER: Very short, your Honor. I can finish in a few minutes.

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CROSS-EXAMINATION

BY MR. HOCHHEISER:

Q Agent Kobell, on May 11, 1973 you were conducting surveillance in the vicinity of Kat Vin Jewelry, right?

A Yes, sir, that's correct.

Q This is apparently a small retail shop?

A Yes, it is small retail jewelry shop.

Q Something like in the neighborhood of ten feet by

sixteen feet or something like that, on the insde?

A I have never been in it, I don't know.

Q But it would be reasonable to characterize it as a small shop?

A Yes, sir.

Q You say that you saw Vitale go into Kat Vin on May 11, 1973; is that right?

A That's correct.

Q Did you see him come out with anything in his hand?

A Not that I can recall, no, sir.

Q Did you see Mr. Lubrano?

A No, sir, I did not.

Q Did you see Mr. Vitale go in and out of Kat Vin a number of times, would you say that?

A Yes, severals times.

Q And on these occasions he opened the door and went in?

A Yes, sir.

Q Is there a glass window in the front?

A Yes, there is.

Q It has a glass front, would it be fair to characterize it that way?

A No, the front is not completely glass. I would imagine it's about three-quarters glass. Glass plate window.

Q Did you ever on May 11, 1973 see Mr. Lubrano in that store?

A No, sir I did not.

Q Did you ever see him -- you didn't see him?

A No, sir.

Q You didn't see him on May 11?

A No, sir.

Q Coming back to August 20, 1973, you observed the Gaiety East Restaurant and you said that you saw Mr. Lubrano and you saw Mr. Finn enter that restaurant; is that right?

A That's correct.

Q There came a time when you saw Mr. Finn exit?

A Yes, sir.

Q Was Mr. Lubrano still in there or had Mr. Lubrano exited prior to that?

A I had not seen Mr. Lubrano exit.

Q When Mr. Lubrano and Mr. Finn were in that restaurant, was there any other agent in that restaurant?

MR. TIMBERS: Other than what? You said any other agent.

MR. HOCHHEISER: He's an agent, right?

MR. TIMBERS: He hasn't testified he was in the restaurant.

MR. HOCHHEISER: Yes, I'm sorry.

BY MR. HOCHHEISER:

Q Was there any agent in that restaurant during the period of time that you observed the restaurant?

A Well, sir, I was not in the restaurant.

Q I know. Was there any agent in the restaurant? Your job was to watch from the outside, right?

A That's correct, sir.

Q Was there somebody whose job it was to watch on the inside?

A I did not see any agent enter the restaurant.

Q How long had you had that under observation prior to the time that Finn and Lubrano went in?

A Well, it had been sometime. I'd been on surveillance there since the initiation of the surveillance.

Q You saw them go in, you say, about 7:30 p.m.?

A Approximately, yes, sir.

Q How many minutes or hours had you been watching them?

A It was not a matter of hours. Surveillance had only been established maybe around 6 o'clock or later.

Q There came a time when you saw Finn exit; is that right?

A That's correct.

Q Where were you when Finn exited?

A I was directly across Lexington Avenue.

Q Did you ever see Finn meet Agent Peterson upon exiting that restaurant?

A Yes, he did meet Agent Peterson after exiting.

Q Where did he meet Agent Peterson?

A Somewhere on the lower east side of Manhattan.

Q You saw that?

A Yes, I did.

Q You didn't see him meet Peterson on the street in the vicinity of the Gaiety East Restaurant, did you?

A No, I did not.

Q You didn't see him meet with Peterson at that time?

A No, sir.

Q How did Finn get from the Gaiety East down from the area or -- did you say Canal Street?

MR. TIMBERS: He said the lower east side.

Q Lower east side.

A He drove, sir. He had his own car or his own means of transportation. I don't know if it was his own car or somebody else's.

Q Was anybody with him?

A He was alone.

Q In that car?

A That's correct.

Q Was that a car provided by the government?

A No, sir, it was not.

Q It was his own car?

A I have no idea whose car it was.

Q Where was that car parked when Finn was in the restaurant?

A It was, I believe, parked on one of the streets, 55th Street or East 56th Street, somewhere east of Lexington. The exact location, I just don't recall.

Q That car wasn't kept under surveillance during this activity, was it?

A I did not have it under surveillance.

Q Do you know whether -- do you have any reason to believe that that car was kept under surveillance?

A I have no way of knowing, I don't know.

Q It wasn't until Mr. Finn got down to the lower east side that he met with Mr. Peterson; is that correct?

A Yes, that's correct.

Q You saw that meeting?

A Yes, I did.

Q Did you see Mr. Finn give Mr. Peterson anything?

A No, I did not.

Q How long had you observed Mr. Finn together with Mr. Peterson in the lower east side?

A Well, they met. I observed them meet. And I asked

Mr. Peterson if he needed any further assistance, and he said that he did not, and I left, and that was the extent of it.

Q You didn't see Mr. Peterson search Mr. Finn, did you?

A No, absolutely not, I did not.

Q Did you see Mr. Finn's automobile at that time?

A Sure. My testimony before was that when they got down there, Mr. Peterson got in the car with Mr. Finn.

Q What kind of car was it?

A Well, I believe it was a Duster or a Dart. It was a Plymouth, a small mid-sized Plymouth, I believe.

Q You don't know where he got it?

A I have no idea.

Q So far as you know it wasn't from the government?

A As far as I know, that's correct.

Q Did there come a time after your surveillance of the Gaiety East Restaurant that you undertook to tail some people that came out of the Gion Bar?

A I don't recall that happening, no. I don't recall being involved in that situation.

Q Were you with Sennett during these proceedings?

A No, sir, I was not.

Q Maybe I'm confused. Was your partner Sennett?

A At the time, yes, it was.

Q Were you and Sennett observing the activities at the Gaiety East Restaurant?

A Yes, sir.

Q Were you and Sennett together at the time that Finn came out of that restaurant?

A I believe not.

Q Where do you believe Sennett was?

MR. TIMBERS: Objection.

THE COURT: Yes.

Q Did there come a time when Sennett and yourself parted company?

A Yes, there did come a time.

Q About what time was that, do you know?

A It was sometime during the surveillance, I really don't know what time it was.

Q Was it that you were called upon to do something else, or was he called upon to do something else? What happened?

Q Well, I believe that --

THE COURT: Don't tell us what you believe. Tell us one what you know of your own knowledge.

Q What is your best knowledge?

A I only know there came a time when he got out of the car and did something else on foot.

* * *

ellk Smith - Direct (644)

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MR. TIMBERS: The Government calls Thomas W. Smith.

T H O M A S W. S M I T H, called as a witness by the Government, having first been duly sworn, testified as follows:

DIRECT EXAMINATION

xxxxx BY MR. TIMBERS:

Q Mr. Smith, by whom are you employed present?

A The Drug Enforcement Administration.

Q Where are you stationed with the DEA?

A St. Louis, Missouri.

Q What is your position in St. Louis?

A I am a group supervisor of the traffic force there.

Q Directing your attention to May of 1973, where were you stationed at that time?

A In New York City.

Q What was your position at that time?

A I was a special agent.

Q In your position as a group supervisor are you familiar with the procedures followed by the Drug Enforcement Administration in conducting surveillance observations of drug transactions?

A Yes, sir, I am.

Q If an informant --

MR. HOCHHEISER: Objection, your Honor.

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* * *

A Yes, sir, I was.

Q Were the principles which you just described followed in the surveillance in those transctions?

A Yes, sir, as close as they could.

Q Directing your attention to April 12, 1973, did you participate in the investigation of this case on that date?

A On April 12, yes, I did.

Q Will you tell the jury what you did on that day and what you observed?

A Yes. My partner, Agent Peterson, and I met with the informant in this case, Tony Finn, and instructed him to meet with one of the defendants.

Q Which defendant was that?

MR. GEOLY: Judge, I am going to object to that, who he instructed the informant to meet with.

THE COURT: Overruled.

A We instructed him to meet with Anthony Rizzo and attempt to arrange for a purchase, or to arrange for a purchase of cocaine to take place later.

Q Did you observe such a meeting take place?

A Yes, Agent Peterson and I met with the informant, and we followed the informant to a meeting that took place in the vicinity of 55th and Lexington, 56th and Lexington,

I can't be exactly sure, in front of a jewelry store at the corner.

THE COURT: Please try to keep you voice up.

Q Do you remember the name of the jewelry store?

A Yes, it was the Kat Vin Jewelry Store.

Q What happened at the Kat Vin Jewelry Store?

A The informant met briefly with Anthony Rizzo. They entered a restaurant there, as I recall, a restaurant or a bar, where they conversed for some few minutes. We then again met with the informant after they parted.

Q Did you go inside that restaurant?

A No, sir, I did not.

Q How long was Tony Finn and Anthony Rizzo inside the restaurant on that day?

A I can't be sure of the exact time. Only a few minutes. Less than half an hour.

Q Do you see the person who Tony Finn met with on April 12th in the courtroom today?

A Yes, sir.

Q Will you point to him, please?

A He's the middle of the three gentlemen sitting in the back.

MR. TIMBERS: May the record reflect that the witness have identified the defendant Rizzo?

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by some person who is not available to be called as a witness here and cross-examined as to what he said at the time. So you are to disregard the statement made by this witness that Mr. Finn told him that the second voice was Vitale's voice on the transcript.

All right. Let's proceed now, Mr. Timbers.

DIRECT EXAMINATION CONTINUED

BY MR. TIMBERS:

Q Agent Smith, moving on to the next day, May 11, 1973, will you tell the jury what, if anything, happened on that day?

A Yes, I was again stationed on surveillance in the vicinity of Allen Street and Canal, in the same surveillance van using video tape equipment.

I arrived there a little before noon, between 11:30 and noon, I believe, and I was stationed there to observe the same rented vehicle as it was placed in another position by an agent and left there.

Q Did you observe the car left there?

A Yes, I saw them as they parked the car.

Q Who parked the car there?

A One of our agents. I believe Agent Buceti.

Q What, if anything, did you observe while you were parked in the surveillance van?

A Later that afternoon, right on the early evening, I observed a male person come to the trunk of the vehicle, insert the key, open the turn, place something in the trunk, close the trunk and walk away.

He walked up Canal from Allen Street.

Q Perhaps you could step down and approach the blackboard again to show exactly the various locations that you are speaking of.

(Witness steps down.)

Q Where on the blackboard was the rental car parked in the afternoon, early evening of May 11?

A Back here a little way. This is a little out of proportion.

Q For the record, let me make clear. You are pointing to a spot a little south of the 11 on the diagram?

A Yes.

Q Where is the van parked?

A The van was further out, around the curve. We were observing across the curve to the trunk of the vehicle.

Q Where did the man who opened the turn come from?

A I don't know where he came from. I didn't see him until he got to the trunk of the car.

Q Where did he proceed to after he finished putting

something in the trunk?

A He proceeded to cross the street and disappear from my view in this area. This would represent the fire company, which is located there. From my position here I could see most of the doors on the fire department. He disappeared up this street here.

Q When you say you could see the doors on the fire department, according to that diagram you could not see the doors on the fire department. Is the diagram inaccurate in the sense that it --

A Yes, I can see up the street from my position almost the entire fire department.

Q Very good. I have no further questions on the diagram. Perhaps you might want to sit down.

What happened after that man disappeared up Canal Street?

A I remained on surveillance there for sometime, maybe another half hour or so, and another agent, Agent Grant, came and picked up the vehicle and drove it from the area.

Q What did you do after Agent Grant drove the car from the area?

A As soon as he pulled the car from the area, we closed down the video tape equipment and we proceeded to go back to our office where we have a garage located.

I met Agent Peterson, Agent Grant there at the garage. I was requested by radio to stop and pick up a camera; I did. I met them down at the garage. We opened the trunk and I took some pictures there of the contents of the trunk.

Q I show you the photograph that is Government's Exhibit 11 and ask you if you can identify that photograph?

A Yes, I can.

Q What is that photograph?

A It is a picture of the trunk of the rented vehicle we were utilizing, that I took that night.

Q Is that photograph you took back at the garage on the night of May 11?

A Yes, it is.

Q I show you the brown paper bag that is Government's Exhibit 10-C and the foil container that is Government's Exhibit 10 and ask you if you can identify those?

A Yes, I can.

Q What are those?

A This is the brown paper bag containing the -- which had this tin foil in it that I removed from the trunk that night.

Q After the bag was removed, were the contents of the bag examined?

A Yes, they were taken to our office where the field test was conducted for the presence of cocaine, and then I placed it in a lock sealed envelope and placed in the vault until such time as it was taken to the laboratory.

Q Was anything else found in the bag besides that tin foil package?

A Yes. There were two-$100 bills in the bag also.

Q I show you Government's Exhibit 13 and Government's Exhibit 14 and ask you whether you are able to identify Government's Exhibit 13?

A Exhibit 13, not without Exhibit 14; no, sir, I can not.

Q Can you do it with the assistance of Government's Exhibit 14?

A Yes.

Q What is Government's Exhibit 13?

A Exhibit 13 is two $100 bills. The other exhibit is the list of serial numbers of the bills which were in the trunk on the 10th. The two bills which were in this package were portions of that, the bills are marked, the serial numbers coincide.

THE COURT: Keep your voice up.

Q What then is Government's Exhibit 13? What are those two $100 bills?

A This is a portion of the money we had placed in the trunk of the vehicle to be utilized in the purchase of this package of cocaine.

Q Did you see those two-$100 bills after they were placed in the trunk of the car?

A Not until we removed them from this bag.

Q You did see those two-$100 bills removed from the bag?

A Yes, sir, I did.

Q They were removed on the night of May 11?

A Yes, sir.

Q During the time on May 11 between the time you saw Agent Buceti park the car, the rental car, and the time you saw Agent Grant drive the car away, did you have the rental car under constant surveillance?

A Yes, I did.

Q Did you see anybody open the trunk of that car other than the individual you have just described as having opened the trunk and then walking up Canal Street?

A No, sir, that was the only one.

Q You testified that you and Agent Klein were in the van taking surveillance pictures, as I recall.

A Yes, sir.

Q What happened to the film on which those

surveillance pictures were taken, after the completion of the assignment?

A Agent Klein gave them to me and I took them to the regional office where they were placed in an evidence vault.

Q Did you place the film in the safe by itself or was it in some sort of a container?

A It was placed in an evidence envelope and put in the vault. It was sealed into an evidence envelope.

Q I show you what has previously been marked as Government's Exhibit 17 for identification and ask you if you can identify that exhibit?

A This is the video tape that we made on those two days.

Q How can you identify that?

A There is an agent's name on here, Mr. Klein, who took the thing, my group identification number, the date he took the film.

Q Is that the video tape that you and Agent Klein made on May 10 and May 11 in the vicinity of Allen and Canal Streets, of the activity around the rental car that you described previously?

A Yes, sir, it is.

MR. TIMBERS: The Government offers Government's Exhibit 17 for identification.

MR. GRABER: No objection, your Honor.

(Government's Exhibit 17 was received in evidence.)

xxxx

MR. HOCHHEISER: Your Honor, if I may, I'm sorry, initially I had not objected. I would not to the offer of this -- the introduction of this evidence as against Lubrano, because I don't believe that there is any evidence connecting Mr. Lubrano to the events on this tape.

THE COURT: This tape relates to what date?

MR. HOCHHEISER: May 10 and 11, your Honor.

MR. TIMBERS: I believe there is sufficient connection now, your Honor, but we will take it subject to connection.

THE COURT: All right.

MR. GEOLY: Same ruling as to Rizzo, your Honor?

THE COURT: Yes.

MR. TIMBERS: Ladies and gentlemen of the jury, the Government is now going to play the video tape that Agent Smith has described to you. It will take a minute to get it set up. It is going to be played on these two monitors that will be placed at the ends of counsel table and Agent Smith will describe to you what is happening while it's being played.

Q Agent Smith, can you see the monitor from where

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ellk ** ** (789)

MR. TIMBERS: The Government offers Government's Exhibit 24.

MR. GRABER: No objection.

xxxx (Government's Exhibit 24 was received in evidence.)

MR. TIMBERS: Ladies and gentlmen of the jury, the stipulation that has just been marked Government's Exhibit 24 provides as follows:

It is stipulated between the parties that Jay's Jewel Box, 89 Canal Street, New York, New York was the place of busines of defendant Anthony Rizzo during the months May to October, 1973. It is further stipulated that East Side Jewelry Exchange, 83 Canal Street, New York, New York was the place of business of defendant Victore Vitale during the months of May to October, 1973.

It is further stipulated that Kat Vin Jewelry, 137 East 56th Street, New York, New York was the place of business of Defendant Philip Lubrano during the months May to October, 1973.

MR. HOCHHEISER: Your Honor, may the record reflect that the stipulation is arrived at by each defendant and each lawyer stipulating as to the place of business of his own client.

THE COURT: Yes.

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* * * *

conspiracy is attributable to him. That is why we say subject to connection.

So having found that there is evidence quite independent of what anybody else said or did with respect to Mr. Vitale, then anything else now in the record done by anyone else can be considered by the jury and the jury will be charged, of course that in determining whether Mr. Vitale or any other defendant was a member of the conspiracy, they have to look at all the evidence.

But the Court has to make a determination now as to whether there is sufficient independent evidence with respect to each defendant, quite aside from what any other defendant did.

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Is there a motion on behalf of defendant Lubrano?

MR. HOCHHEISER: Yes, your Honor.

Your Honor, most respectfully, I know motions at this juncture in the case are routinely and I guess necessarily made, and generally speaking in a case that doesn't have any special circumstances, such as the absence of this witness, Finn, which happened certainly beyond the control of the Government, that these motions normally would be of necessity denied.

However, here, due to the peculiar circumstances of this case, it occurred to me when I was trying to write

elik (809)

out what my summation would be, there was no summation I could write, because there really is no evidence against Lubrano. I will explain why.

With regard to the May 1st transaction, there is nothing said about Lubrano at all. With regard to the May 11 transaction, there is nothing to do with Lubrano except what I'll get to in a moment, and indeed, your Honor admitted the motion picture, it's video tape as to Lubrano only suject to connection. That connection was never developed, your Honor. The only connection on May 11 between Lubrano and the other defendants is supposed to arise out of the fact that Vitale was allegedly seen going into the Kat Vin Jewelry Store, that's Lubrano's store, and coming out and going to a bar and going back etcetera.

But never seen carrying anything, and indeed, Philip Lubrano was apparently not there. He wasn't seen. Every agent agreed with me in the testimony that they did not see Lubrano.

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THE COURT: This is what date?

MR. HOCHHEISER: May 11.

The next transaction was August 20, and what we have here is Finn is in the Gion Bar, he's talking to some people. Lubrano comes in, according to one of the agents although another agent didn't mention it at all, and there is

ellk (810)

no conversation heard at this point, and there is no tape recording in evidence, and Lubrano and Finn go across the street into the Gaiety East Restaurant. Quite to my surprise, each agent testified that to their knowledge there was no agent inside the restaurant. The only evidence we have is that Lubrano and Finn separately exited the luncheonette, and then Finn got into his automobile, which according to the testimony was unguarded and unwatched, and drove down someplace where he gave a package to Peterson some distance away, which the inference is supposed to be that that came from Lubrano.

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But because of the peculiar circumstances of this case, your Honor, you can't say beyond a reasonable doubt that it did, in the absence of Finn. The inference would almost have to be an exclusive inference that it came from Lubrano, when he was talking to other people in the bar. When they went into the luncheonette, we don't know what happened there, we just asked to assume or infer that he got the stuff from Lubrano, assuming that he got it in the luncheonette at all, and there is just no evidence that he did. That's the whole thing on August 20.

Then on October 4, which is not a substantive count, August 20 is the third count in which Lubrano is charged alone for the sale, October 4 is an alleged sale which is not the

ellk (811)

subject of a substantive count but which Mr. Timbers has indicated he's offered as proof of the conspiracy in general, the first count of the indictment.

The only evidence against Mr. Lubrano as to October 4 is that Mr. Lubrano and Mr. Finn were separately walking on opposite sides of Lexington Avenue, that they each entered a residential skyscraper at 141 East 55 or 56th Street, I forget which street, separately, separated by over two minutes, I think was the testimony. There was testimony that sometime later, I think it's 25 minutes later or so, Mr. Finn exited that building and there is no testimony that anybody ever saw Mr. Lubrano exit, and the reports indicate that nobody ever did. And Mr. Finn then gave to Agent Peterson, I think, the tube contained the cocaine.. The evidence is that we don't know where on this record where Finn went in that building, who he spoke to, even that he was with Lubrano in that building. There is just no such evidence.

As I say, it's peculiar so because he's either here to testify. If he was, he would be here to explain based on the report what happened, in his judgement. And that's it.

The only evidence against Lubrano really is evidence of association with Finn and evidence of association with another defendant in the case, and that's it. There just isn't anything

elik (812)

of substance against Lubrano, your Honor

I could understand where I made the motion earlier and your Honor waited to see what would happen from the Government. But it just never happened. This business about Finn exiting the luncheonette with this alleged bulge in his pocket, where the Government has not be able to because they didn't expect the situation to arise, they haven't been able to show that the bulge had to come exclusively from Lubrano, because they went into this luncheonette, there were other people there and there was no agent in there to see what happened. And that's it. Really. Lubrano is associated with people in the case, period, end of story. And it's on that basis that I made the motion both as to the conspiracy count, Count 1 and as to the substantive count, Count 3.

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THE COURT: Mr. Timbers:

MR. TIMBERS: On the substantive count, your Honor, the evidence is as follows:

The agent searched Mr. Finn and his car; they find he doesn't have any drugs on him. They give him $3,750. They keep him under constant surveillance as he drives up to the vicinity of Gion Bar.

When he enters the Gion Bar there are agents inside, they are watching Mr. Finn and the people he's talking to. They testified that they never saw any of the people

that he was speaking to inside the Gion Bar give him anything. He's in the Gion Bar for less than five minutes.

Agent Buceti testified that when Finn came in initially Lubrano wasn't there. Somebody left, came back, Lubrano showed up shortly afterward. He didn't talk to Finn originally, he talked to the other individual and then he talked to Finn.

The Government would submit that he didn't know Finn when he came in, the jury could find he didn't know Finn when he came in, that he was introduced to Finn. All of this happened within five minutes.

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Then they leave the Gion Bar. So far Finn has been under constant surveillance and he's never been seen to pay anybody money or to receive any drugs.

They go into the Gaiety East Restaurant. They are in there again the testimony was for a very short time, in the vicinity of five minutes or less. The agents are watching them very closely because they know that a narcotics deal is going down.

Agent Kobell testified that when he came out, Finn had a bulge in his pocket. Finn then got in his car --

THE COURT: Lubrano was seen in the Gaiety East?

MR. TIMBERS: Was seen in the Gaiety East by Sennett, who nearly bumped into him as Agent Sennett was

walking into the restaurant and Lubrano was walking out. They then, when Finn arrived at the prearranged meeting place, he doesn't have the money, he has this package of cocaine. The Government submits that the jury could find that the only place that he could possibly have received those drugs was in the Gaiety East Luncheonette, the only time that he wasn't under surveillance, and the person that he entered with was Lubrano.

They were only in there for a short period of time. The Government submits that the jury could find that what they did in there was to exchange the drugs.

THE COURT: Were there agents in the Gaiety East Bar?

MR. TIMBERS: No, there weren't your Honor.

THE COURT: There were not agents in that bar?

MR. TIMBERS: There were no agents in the bar.

THE COURT: In the Gaiety East, but there were agents in the Gion Bar, which they just left?

MR. TIMBERS: That's right. The Government submits that the jury could find that the reason they didn't do the deal in the Gion Bar was because as Agent Buceti testified, the people that Finn was meeting were, Rizzo and Salvato, kept looking around, the jury could find that they were nervous,

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ellk (815)

that Agent Buceti was a Drug Enforcement Agent, therefore they didn't think that the Gion Bar was a sensible or safe place to do the deal and therefore the reason they went to the Gaiety East Luncheonette was that that was a place where agents wouldn't have under surveillance and that would be a safe place to do the deal.

THE COURT: All this relates to August 20?

MR. TIMBERS: That's right.

THE COURT: What about October 4th?

MR. TIMBERS: October 4th is not on substantive count. The Government has only put that in as proof that another -- as another action taken in furtherance of the conspiracy.

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THE COURT: Up to August 20th, is it correct that there is no connection show with respect to Lubrano, up to August 20th?

MR. TIMBERS: No. In terms of date, there is a very tenuous connection on April 12, and then there is a more substantial connnection on May 10th.

THE COURT: What is the connection on May 10th?

MR. TIMBERS: The May 10 connection is, if your Honor will read the second transcript, Government's Exhibit 9 --

MR. HOCHHEISER: Are you talking about acts of Lubrano and not acts of others?

ELLK (816)

THE COURT: That's right. Lubrano.

MR. HOCHHEISER: I don't believe Lubrano is on any transcript at all.

THE COURT: He's not on the May 10th transcript.

MR. TIMBERS: That's right, your Honor. I'm sorry.

THE COURT: Up to August 20th is there any evidence with respect to Lubrano?

MR. TIMBERS: No, there is no evidence prior to August 20th.

THE COURT: So we have just gone over August 20th. Now we are on October 4th.

MR. TIMBERS: As far as connection is concerned, the Government submits that all of the connection evidence comes on August 20. The transction on -- and the connection is the introduction or the Goverment submits the introduction of Rizzo -- I'm sorry, the introduction of Lubrano to Finn by Rizzo in the Gion bar.

MR. HOCHHEISER: There is no evidence.

THE COURT: Just a minute. This is on October 4th?

MR. TIMBERS: No, August 20th.

THE COURT: I can't follow you if you jump back to August 20th. I thought we had left August 20. We are now moving to October 4. What is there in the record with respect to October 4th? What occurred on October 4th?

MR. TIMBERS: On October 4 Finn walked to the apartment building at 141 East 56th Street. He entered the apartment about two minutes after Lubrano entered the apartment.

MR. HOCHHEISER: Building.

MR. TIMBERS: I'm sorry, building.

He entered the building about two minutes after Lubrano entered the building. He came out about 15 minutes later, met with agents, was given money, was searched. He did not have any drugs. He went up in the building again, came out after being up there for about 15 more minutes and had this cylinder which is Government's Exhibit 16. The Government doesn't claim that that shows a connection with the other defendants. It's simply another act in furtherance of the conspiracy.

MR. HOCHHEISER: How could it be, your Honor, if it's not connected to the other defendant? They are all of the same conspiracy allegedly.

As I said, this man, according to the reports, was in their for 25 minutes, came out, Lubrano didn't come out. This is a skyscraper. Then the man went back in, allegedly with money. Lubrano wasn't seen. The man stayed somewhere in the building for some period of time, or went through the building. I don't know where he went. Came back

ellk (818)

out. Lubrano wasn't seen. Lubrano was never seen that night.

THE COURT: Lubrano was seen entering the building?

MR. TIMBERS: That's correct.

MR. HOCHHEISER: He entered the building and there is no connection between this man and Lubrano on October 4th, that they were both in the same building within a half hour and then the man came out with drugs? How could a man be convicted of a crime on evidence like that?

MR. TIMBERS: The Government submits that there was a conspiracy between Rizzo, Vitale and Lubrano to distribute all of the cocaine here and that the distribution by Lubrano on October 4th was an overt act in furtherance of the conspiracy.

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MR. HOCHHEISER: You say by Lubrano, but you have really left over a big chasm here. What evidence is there by Lubrano? There is no evidence that Lubrano --

THE COURT: The problem with the argument right now is, and you're interrupting Mr. Timbers, we are trying to get through this. If you gave him a chance, I will give you a chance to reply.

MR. HOCHHEISER: Thank you. I'm sorry, your Honor.

THE COURT: Let me ask you this: Going back to

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ellk (819)

August 20, on August 20 what other defendants were seen in connection with that transaction between the Gion Bar and the Gaiety East?

MR. TIMBERS: Rizzo.

THE COURT: Rizzo was where again?

MR. TIMBERS: Rizzo was in the Gion Bar. He was in there before Lubrano entered. I believe Agent Buceti testified that he could not recall whether it was Rizzo or the other man who left momentarily.

The Government would submit, however, that whoever it was that left, left to call Lubrano because very shortly after that Lubrano came down into the bar. Finn and Lubrano were, the Government submits, introduced and then Finn and Lubrano left.

THE COURT: Was Rizzo in the group when Lubrano came in?

MR. TIMBERS: Yes

TEH COURT: Is that in the testimony?

A Yes. In fact, the testimony was that Lubrano came in and initially talked to Rizzo and I believe Salvato, not to Finn, and then afterwards, I forget whether there was actual testimony about introduction or whether it was just inferred that there was an introduction, and then Lubrano talked directly to Finn.

ellk (820)

THE COURT: This October 4th transaction you say that that's evidence that Lubrano was a member of the conspiracy?

MR. TIMBERS: No, I don't believe that's the Government's position. The Government in terms of connecting up Lubrano to the conspiracy, the Government does not claim that that shows that Lubrano conspired with either Vitale or Rizzo. The Government contends that that was something done by Lubrano in furtherance of the conspiracy, but we don't have any evidence that -- we are not counting on that evidence to tie Lubrano into the conspiracy.

THE COURT: You are relying solely on the August 20 transaction?

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MR. TIMBERS: Right. In other words, Rizzo makes the introduction on August 20 and then sales that occu after that are in furtherance of the conspiracy that's shown on August 20.

THE COURT: All right. Now, Mr. Hochheiser, you may reply.

MR. HOCHHEISER: Your Honor, what's happening here is that we keep jumping these chasms.

Mr. Timbers says that the August 20 situation connect up Mr. Lubrano and that anything that happened thereafter is in furtherance of the conspiracy.

Then we say, well, it happened; therefore it's in furtherance of the conspiracy. But we never established that it happened. Going back to August 20, which is the key here, the agents testified that they watched people in the bar talking to Mr. Finn and that the -- the thrust of their testimony was or the purpose of it was to show that he was under surveillance at the time so that you could say that he got drugs from anybody in that bar. That's what I was talking about, the exclusivity of the inference. What happened was, for some reason that I'm not aware of, but evidently Mr. Timbers had in mind when he almost explained it, then he realized it wasn't in the record, for some reason I'm not aware of, the agents failed or were unable to make these kinds of observations by being inside the Gaiety East Luncheonette. What happens here, regardless of what we talk about in the Gion Bar, when Finn went into the Gaiety East Restaurant, we don't have his testimony, we don't have testimony, his voices, we don't know whether he got drugs from the counter man or the waitress or 12 or 15 people that might be in there or he picked it up under a seat or in the telephone booth or in the men's room where it was secreted by somebody else. We just don't know.

What we are talking about, Judge, is guilt by association. Mr. Lubrano's place of business is a stone's

throw from this bar. It's a reasonable place for him to be. The other people that Mr. Timbers is talking about, Mr. Rizzo was there, these are jewelers. There is nothing sordid about their association in a neighborhood bar right next to Mr. Lubrano's jewelry store.

Mr. Timbers says, "Well, somebody made a phone call and we can infer that the phone call was to Lubrano because he walked in subsequent thereto." That's not a proper inference.

I submit, your Honor, that if the Court were to allow this case to be to the jury against Lubrano on the record that now stands, we have basically guilt by association. Mr. Lubrano didn't say anything in this record and he didn't do anything on this record except that he happened to be in two places, and there is no further evidence of that.

I don't know what I would tell the jury. There is nothing for me to put in my hand and talk about. And then we get to October 4th and he says, doesn't that link him up, the two men walked into a skyscraper and one man came out and the other man wasn't seen again and we don't know if he came in the other entrance and we don't even know if he has an apartment there, and we have this evidence against Lubrano on October 4th in furtherance of some conspiracy that Mr. Timbers is not evidence to connect him to it.

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I submit to Your Honor that if there ever was a case where there was some evidence of association but not evidence sufficient to overcome a Rule 29 motion, this is the case against Lubrano, and I say that most sincerely.

MR. TIMBERS: I don't want to interrupt Mr. Hochheiser. I think I have been operating under a misapprehension of the law. I really have not stated one additional piece of evidence besides the August 20th meeting that's relevant to Mr. Lubrano's participation in the conspiracy. That's with regard to what happened on May 1, 1973. That's the deal with the car.

The testimony of May 11, this ties Vitale into Lubrano. The testimony on May 11 was that at about 5:30 Vitale was seen to leave his place of business. Shortly after that, within half an hour or so, he was seen at the Kat Vin Jewelry Store, Lubrano's place of business. He was seen in the Kat Vin and he was seen making phone calls from the bar next door.

Then at 7 o'clock the cocaine is put into the trunk of the car by the Oriental man and the Oriental man walks back to Vitale's store where he's seen giving -- where he's seen talking to Vitale.

The Government would submit that in addition to the August 20th, we have already discussed this evidence permitting

the jury to infer that Vitale picked up the cocaine that was put into the trunk of the car on May 11 at Kat Vin Jewelry Store and brought it back and put it into the trunk of the car.

MR. HOCHHEISER: Your Honor, there is no evidence of that. He was obviously, if he was doing anything, he was looking for Phil Lubrano, who wasn't there. If he was doing anything, he came up there, looked up, the agent didn't see Lubrano. He didn't even know Lubrano, evidently. He wasn't even closely associated enough to use Lubrano's telephone. He went to the next convenient place to use a telephone. There is no evidence he went inside and picked up anything.

MR. TIMBERS: There is evidence that he was inside for quite a period of time. When I say quite a period of time, I mean 10, 15 minutes --

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THE COURT: Vitale was in Lubrano's place for quite a period of time?

MR. TIMBERS: Yes. There was no surveillance, though. That Mr. Hochheiser can speculate on that, but there is for summation. There is sufficient evidence to get to the jury, and the Government suggests that the inferences to be drawn from these facts are valid inferences that would permit the jury to conclude beyond a reasonable doubt that Lubrano is connected with Vitale.

MR. HOCHHEISER: Associated with. That's what I

am talking of, your Honor. We have proved that's an association. We haven't proved what the nature of the association was, we haven't proved what kind of dealings these people had with each other, if any, all of them being jewelers.

It's not inference. It's really speculation. If I could multiphy Mr. Timbers 12 times, your Honor, to speak a little foolishly --

THE COURT: You have a little association here proved, that is they were all in the same business, but in addition we have the evidence of what occurred on August 20 when Mr. Lubrano went into the Gion Bar, was seen to leave with Finn and to go into the Gaiety Luncheonette. When Finn came out he was seen with this bulge in the pocket.

MR. TIMBERS: That's correct.

THE COURT He met the agents and turned over Government's Exhibit 15.

MR. HOCHHEISER: But where did he get it?

THE COURT: Then we have in addition the evidence with respect to October 4th that Finn went into the building shortly after Lubrano went in, came out, got some money, went back and came out with Government's Exhibit 16. So that the motions with respect to defendant Lubrano are denied; since there is evidence from which the jury could find beyond a reasonable doubt that he's guilty of the conspiracy charge as well as

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(890)

an objection. That's not fair.

THE COURT: Proceed, Mr. Timbers.

MR. TIMBERS: We have been here for almost a week, but the evidence in the case is really very simple. There are four sales in the case, four sales of cocaine.

The first one takes place on May 1st, 1973 downtown in the area of Jay's Jewel Box, Block's Bar. It's Government's Exhibit 3 that was sold on that night.

The next sale is the sale in the trunk of the car on May 10th. That's Government's Exhibit 10.

The next sale is the sale in the Gaiety East Restaurant with Lubrano and Finn inside. That's Government's Exhibit 15.

And the final sale is the sale in the apartment at 141 East 56th Street, when Finn walks in after Lubrano, and that's Government's Exhibit 16.

Altogether, that's nearly a pound of cocaine for which the defendant Finn made more than $14,000.

Any difficulty that there is in this case results from the fact that, completely beyond anybody's control, the key person in the case, Tony Finn, is not here available to testify and to tell you what happened.

You noticed that during the trial the defense lawyers were very careful to ask each witness, "of your own

knowledge." They didn't want you to hear what Tony Finn could have told you about what happened in these transactions.

MR. HOCHHEISER: I must object to that, your Honor. I must object to preserve the record. The Court of Appeals says so. I must object to that comment.

THE COURT: Your objection is registered.

MR. HOCHHEISER: Is it overruled, your Honor?

THE COURT: Overruled.

MR. TIMBERS: The Government has played by those rules. The only evidence that you have heard is evidence that came in through people other than by Tony Finn. In one or two instances the defendants opened up the subject of what Tony Finn said and there are one or two pieces of receivable evidence that you can consider of what Tony Finn said.

But in general our case is based on what we considered at the time to be our secondary or back-up source of proof, and that is the surveillance of what Tony Finn was doing and the tape recordings and video tapes of the various different transactions.

Therefore, you have to bear with us to the extent that we can not tell you all the things that Tony Finn could tell you if he was here. One of the main points that the defendants made in their combined presentations to you was that Tony Finn is a person not to be trusted and in fact they

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ellk (896)

isn't here to testify to what happened, the circumstantial evidence is compelling.

With that windup and lead-in, let me tell you what the Government believes the evidence in this case shows and I am going to tell you about the inferences that I believe can be drawn from the evidence. First of all, the Government submits that the evidence in this case shows a conspiracy among the three defendants in which the defendant Lubrano was the source of the cocaine. Lubrano was supplying all the cocaine that is on this table right here.

In the beginning Lubrano preferred to stay in the background. He was the big man, he wanted his little men to do the deals. So Rizzo is the one who makes the initial introductions of Finn to Vitale. Vitale is going to do the actual face to face dealing for Lubrano.

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The first two deals Finn does with Vitale. The first deal is the May 1st deal. They go to Block's Bar; then they go to Jay's Jewel Box downtown. That's when they get this little sample. The second deal is the May 10 deal, the trunk of the car deal. There is no evidence on the first deal, quite frankly, that that came from Lubrano. But the Government would suggest when you think of the whole thing, that the conclusion is that Lubrano was the source of supply in this case.

* * * *

ellk (910)

had to know that the deal was going down in the Gaiety East Restaurant. If Finn had known the deal was going to go down in the Gaiety East Restaurant, don't you think that the Government would have had agents in there to watch the deal?

The Government suggests that what happened was that when Lubrano showed up, hearing that there were suspicious people around the bar, he decided that it was best to do the deal some other place. They went around to the Gaiety East Restaurant. The reason there was no surveillance there was that the Government didn't expect the deal was going to go down there and the reason Mr. Hochheiser's story about Finn faking a deal is full of holes is because Mr. Finn had no way of knowing that the deal was going to go down in the Gaiety East Restaurant. He didn't know that that was the place to plant this bag of cocaine.

I have to admit to you that that's all circumstantial evidence, because Tony Finn is not alive today. I'm candid with you; that's the evidence we have today, and that's what we present to you on this count.

The final deal is the October 4, 1973 deal. It's a very simple deal and I won't spend much time on it. What happens is that it's traditional surveillance: Finn is searched, found to not have anything on him. He goes into an apartment

building, Lubrano goes in a few minutes ahead of him, they are in the apartment for about 15 minutes and then Finn comes out of the apartment again. We have no testimony about what happened in there because Finn isn't here to give it and there was nobody inside on surveillance. Finn comes back, talks to the agents, tells them something; as a result of what he tells the agents, they give him some money, search him again, he doesn't have any cocaine on him, he goes back up into the apartment. He's there for about 15 minutes. We don't know where he is, all we know is that Lubrano still hasn't come out of the building. But when Finn comes out of the building, he has this cylinder of cocaine with him.

I will be quite candid with you on this count -- on this transaction. I think the Government's evidence that this came from Lubrano, of all our counts, is probably the weakest on this count. The Government submits that you can conclude from the fact that Finn went into that apartment building after Lubrano, that he previously bought cocaine from Lubrano on August 20; that he bought it from Lubrano on this date also, inside the apartment, since we know Lubrano was inside the apartment. But I would like to just point out one thing to you in connection with this. This October 4 transaction is not charged as a substantive count in the indictment. Therefore, if you find you have a reasonable

ONLY COPY AVAILABLE

doubt as to whether Lubrano sold Finn this cocaine, nothing falls as a result of that. We haven't charged that as a specific sale, and if you find that there is other believable evidence that Lubrano was a member of the conspiracy, then although we have put this in as part of the conspiracy, it's really just corroborative or additional evidence, and if you find that you don't believe that this was sold by Lubrano as part of the conspiracy, but you believe that Lubrano sold drugs on other occasions, provided drugs on other occasions, then you can still find Lubrano guilty of the conspiracy count.

I think I have shown you -- the defendants raised several points in their arguments to you. I think I have shown you, hopefully I have, that it was virtually impossible for Finn to set up these, to deceive the Government in the way the defendants claim they did.

A second major attack was on the tape recordings. Before I get to that, I'd like to just touch one other point because I'm going to get into the tape recordings at the end of my presentation to you.

The other point I'd like to touch on is there were some areas in the agents' testimony, I'm frank to admit that, they apparently got the location of Division Street mixed up. We haven't had a chance to go and to check the map, but I am

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D. C. Form No. 100
CRIMINAL DOCKET

JUDGE MOTLEY

74 CR. 577

| TITLE OF CASE | ATTORNEYS |
|---|---|
| THE UNITED STATES | For U. S.: |
| vs. | James E. Nesland, AUSA |
| ANTHONY RIZZO-1 | 264-6470 |
| VICTOR VITALE-1&2 | |
| PHILIP LUBRANO-1&3 | 3-27-75 |
| | For Defendant: |

| ABSTRACT OF COSTS | AMOUNT |
|---|---|
| (07) | |
| Fine, | |
| ~~Clerk,~~ 1,2+3 | |
| Marshal, | |
| Attorney, | |
| ~~Commissioner~~ 21 | |
| ~~Counts~~ 846,812,841(a)(1),(b) | |
| Consp. to viol. Fed. Narcotic Laws.(Ct.1) | |
| Distr. & possess. w/intent to distr.Cocaine,II.(Cts.2&3) | |
| (Three Counts) | |

CASH RECEIVED AND DISBURSED

| DATE | NAME | RECEIVED | DISBURSED |
|---|---|---|---|

UNITED STATES COURT OF APPEALS FILED APR 17 1975 A. DANIEL FUSARO, CLERK SECOND CIRCUIT

| DATE | PROCEEDINGS |
|---|---|
| 6-6-74 | Filed indictment, B/W ordered as to all defts. Cannella,J. |
| | Bail fixed by the court at $10,000, cash or surety as to all defendants. Cannella,J. |
| 6-17-74 | No appearance by defendants. Court directs entry of not guilty plea.Case assigned to Judge Motley for all purposes. Knapp,J. |
| 7-12-74 | Filed Notice of Readiness for Trial by H.C. Batchelder Jr. U.S. Atty. |
| 7-26-74 | Pt A.RIZZO - Filed affdvt. of H.C.Batchelder,Jr. in support of a writ. |
| | ANTHONY RIZZO - Produced on a writ, atty.present. PLEADS NOT GUILTY 10 days for motions Stewart, J..... |

| DATE | PROCEEDINGS | CLERK'S FEES PLAINTIFF. | CLERK'S FEES DEFENDANT |
|---|---|---|---|
| 8-6-74 | VICTOR VITALE - Filed affirmation & notice of motion for a bill of particulars AND discovery. | | |
| 8-7-74 | A.RIZZO - Filed affdvt.of H.C.Batchelder,Jr. Spec.AUSA in support of a writ | | |
| 8-14-74 | P.LUBRANO - Filed warrant of arrest with marshals return. | | |
| 8-14-74 | V.VITALE - Filed warrant of arrest with marshals return. | | |
| -8-26-74 | Filed Govt's memorandum of law in opposition to deft's various motion and requests for discovery and bills of particulars. | | |
| 10-8-74 | PHILIP LUBRANO Filed magistrates papers: docket sheet, warrant, disposition sheet, notice of appearance and appearance bond. | | |
| 10-8-74 | VICTOR VITALE - Filed following papers recv'd.from magistrate, docket sheet, warrant, disposition sheet, appearance bond and Temporary commitment. | | |
| 10-10-74 | FILED Govt's supplemental request and voir dire | | |
| 11-12-74 | Filed Govt's notice of readiness for trial. | | |
| 12-17-74 | PHILIP LUBRANO - Filed affdvt. & notice of motion for a hearing on the audibility of certain tape recordings in possession of AUSA | | |
| 1-2-75 | A. RIZZO- Filed Affidavit of John Timbers AUSA in support of a writ, rtble 1-7-75. | | |
| 1-8-74 | ANTHONY RIZZO - Filed INFORMATION charging prior Narcotic Offense | | |
| 1-8-75 | ALL DEFTS - TRIAL BEGUN with Jury Atty's present.....Motley, J. | | |
| 1-9-75 | Trial cont'd. | | |
| 1-[illegible]-75 | Trial cont'd. | | |
| [illegible] | Trial cont'd. | | |

| | PROCEEDINGS |
|---|---|
| | Trial cont'd. |
| 5 | Trial cont'd. |
| -75 | Trial cont'd. - Deliberations begun. |
| 17-75 | Trial cont'd. & concluded. Deft Rizzo Guilty on count 1...Vitale Guilty on counts 1 & 2....Lubrano Guilty on count 1 Not Guilty on count 3...All deft's continued on present bail...Deft Rizzo writ adjd to March 6-75 P.S.I. ordered Sentences adjd to 11 a.m. March 6,1975....Motley, J. |
| 2-14-75 | ANTHONY RIZZO - Filed affirmation and notice of motion for judgment of acquittal. |
| 3-3-75 | PHILIP LUBRANO - Filed affdvt.and notice of motion for judgment of acquittal. |
| 3-4-75 | ANTHONY RIZZO - Filed memo endorsed on motion filed 2-14-75***Motion for judgment of acquittal is denied...So Ordered...Motley,J. m/n |
| 3-7-75 | Filed Govt's memorandum in opposition to A.Rizzo's motion for judgment of acquital.. |
| 3-18-75 | A.RIZZO - Filed affdvt.of John Timbers,AUSA in support of a writ ret.3/27/75... |
| 3-27-75 | ANTHONY RIZZO - Filed Judgment(Atty.Frank Geoly,present)the deft is committed for imprisonment for a period of THREE YEARS on count 1 to run concurrently with sentence deft is presently serving at U.S.Federal Penitentiary in Lewisburg,Pa. Pursuant to Section 841, Ti.21, U.S.Code, deft is placed on Special Parole for a term of SIX YEARS, to commence upon expiration of confinement.....Motley, J... Ent. on 3-28-75---------- |
| 3-27-75 | VICTOR VITALE - Filed Judgment(Atty.Herman Graber,present)the deft is committed for imprisonment for a period of FIVE YEARS on cts. 1 & 2 to run concurrently with each other...Execution of Prison sentence is suspended..Deft is placed on probation for a period of FIVE YEARS, subject to the standing probation order of this Court.....MOTLEY, J.....Ent.3/28/75 |
| 3-27-75 | PHILIP LUBRANO - Filed Judgment(Herman Hocheiser,present)the deft is committed for imprisonment for a period of FIVE YEARS, deft is placed on special parole for a term of THREE YEARS, to commence upon expiration of confinement...Motley, J.. Ent.on 3-28-75---------- |
| 3-27-75 | PHILIP LUBRANO - Filed notice of appeal from judgment of March 27-75...Leave to appeal in forma pauperis granted...Motley,J... Copy given to U.S.Atty..... |
| 3-28-75 | ANTHONY RIZZO - Filed consent order that deft be allowed under the supervision of a U.S.Marshal to visit his mother****Motley, J. |
| 3-28-75 | P.LUBRANO - Filed Govts memorandum in opposition to judgment of acquittal |
| 3-28-75 | P.LUBRANO - Filed memo endorsed on motion for ~~acquittal~~ /acquittal ...Motion denied after hearing....So ordered Motley, J.. |
| 4-4-75 | A. RIZZO — Filed commitment & entered return. ~~Copy~~ F.D.H. - N.Y.C |
| 4-11-75 | P.LUBRANO - Filed affdvt. & notice of motion for bail pending appeal...Ret.4-15-75.. |

G.J. June 5, 1974 230
SMITH

USA-33s-538 - IND./INF. (Conspiracy to distribute and possess with intent to distribute narcotic drug.)
Rev. 5-27-72

JEN:rs

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- - - - - - - - - - - - - - - - - - - - - -x

UNITED STATES OF AMERICA, :

-v- : INDICTMENT

ANTHONY RIZZO, VICTOR VITALE, and PHILIP LUBRANO, : 74 Cr.

:

:

Defendants . :

- - - - - - - - - - - - - - - - - - - - - -x

The Grand Jury charges:

1. From on or about the 1st day of January, 1973 and continuously thereafter up to and including the date of the filing of this indictment, in the Southern District of New York,

ANTHONY RIZZO, VICTOR VITALE and PHILIP LUBRANO

the defendants and others to the Grand Jury unknown, unlawfully, intentionally and knowingly combined, conspired, confederated and agreed together and with each other to violate Sections 812, 841(a)(1) and 841(b)(1)(A) of Title 21, United States Code.

2. It was part of said conspiracy that the said defendants unlawfully, intentionally and knowingly would distribute and possess with intent to distribute Schedule I and II narcotic drug controlled substances the exact amount thereof being to the Grand Jury unknown in violation of Sections 812, 841(a)(1) and 841(b)(1)(A) of Title 21, United States Code.

USA-33s-538 - [illegible] - IND./INF. (Conspiracy to distribute and possess with
Ed. 5/1/71. intent to distribute narcotic drug.)

JEN:art

OVERT ACTS

In pursuance of the said conspiracy and to effect the objects thereof, the following overt acts were committed in the Southern District of New York:

1. On or about May 1, 1973 defendants ANTHONY RIZZO and VICTOR VITALE met with a Government Informant at Jay's Jewel Box, 89 Canal Street, Manhattan and discussed the sale of cocaine.

2. On or about May 10, 1973 defendant VICTOR VITALE remove $3500. from the trunk of an automobile parked on Allen Street, Manhattan.

3. On or about May 11, 1973 co-conspirator JOHN DOE, a chinese Male, placed a brown paper bag containing approximately 102 grams of cocaine hydrochloride in the trunk of an automobile parked on Allen Street, Manhattan and then met with defendant VICTOR VITALE at the East Side Jewelry Exchange, 83 Canal Street, Manhattan.

4. On or about August 20, 1973 defendants ANTHONY RIZZO and PHILIP LUBRANO met with the Government Informant at the Gion Bar, 133 East 56th Street, Manhattan.

5. On or about August 20, 1973 defendant PHILIP LUBRANO delivered approximately 112.2 grams of cocaine hydrochloride to the Government Informant at the Gaiety East Luncheonette, 684 Lexington Avenue, Manhattan.

(Title 21, United States Code, Section 846)

USA-33s-527A - IND/INF - Distrib. Possess Narc: Drug (Succeeding Count)
Rev. 5-27-72

JEN:art

COUNT TWO

The Grand Jury further charges:

On or about the 11th day of May, 1973

in the Southern District of New York,

VICTOR VITALE

the defendant , unlawfully, wilfully and knowingly did distribute and possess with intent to distribute a Schedule II narcotic drug controlled substance, to wit, approximately 102 grams of cocaine hydrochloride.

(Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(A).) (Title 18, United States Code, Section 2)

USA-33s-527A - IND/INF - Distrib. Possess Narc: Drug (Succeeding Count)
Rev. 5-27-72

COUNT THREE

**The Grand Jury further charges:**

On or about the **20th** day of **August, 1973**

in the Southern District of New York,

**PHILIP LURRANO**

the defendant , unlawfully, wilfully and knowingly did distribute and possess wit intent to distribute a Schedule **II** narcotic drug controlled substance, to wit, **approximately 112.2 grams of cocaine hydrochloride.**

(Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(A).)

**Foreman**

**PAUL J. CURRAN**
**United States Attorney**

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# JUDGMENT AND PROBATION/COMMITMENT ORDER

In the presence of the attorney for the government
the defendant appeared in person on this date → MONTH: March DAY: 27 YEAR: 1975

[ ] WITHOUT COUNSEL — However the court advised defendant of right to counsel and asked whether defendant desired to have counsel appointed by the court and the defendant thereupon waived assistance of counsel.

[X] WITH COUNSEL — HERMAN HOCHEISER (Name of counsel)

[ ] GUILTY, and the court being satisfied that there is a factual basis for the plea, [ ] NOLO CONTENDERE, [ ] NOT GUILTY

There being a finding/verdict of { [ ] NOT GUILTY. Defendant is discharged / [X] GUILTY.

Defendant has been convicted as charged of the offense(s) of unlawfully, wilfully and knowingly distributing and possessing with intent to distribute a Schedule II narcotic drug controlled substance.
(Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(a).

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of FIVE (5) YEARS, defendant is placed on special parole for a term of THREE (3) YEARS, to commence upon expiration of confinement.

MICROFILM
MAR 28 1975

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

The court orders commitment to the custody of the Attorney General and recommends,

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U.S. Marshal or other qualified officer.

U.S. DISTRICT COURT FILED MAR 27 1975 S.D. OF N.Y.

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BY
U.S. District Judge CONSTANCE BAKER MOTLEY

Constance Baker Motley

1975

COPY RECEIVED
PAUL J. CURRAN
AUG 15 1975
U. S. ATTORNEY
SO. DIST. OF N. Y.